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In The

Supreme Court of the United States

GOVERNMENT OF THE VIRGIN ISLANDS, *et al.*,

Petitioners,

v.

BLUEBEARD'S CASTLE, INC., *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether this Court should grant the writ of certiorari, vacate and remand the United States Court of Appeals for the Third Circuit's finding of federal subject matter jurisdiction under 48 U.S.C. § 1401a because this statute: (1) does not confer an implied private right of action in "clear and unambiguous terms" as required by this Court's decision in *Gonzaga University v. Doe*, 536 U.S. 273 (2002); or, in the alternative, (2) was repealed by the Revised Organic Act of 1954, as amended, 48 U.S.C. §§ 1541-1645.

PARTIES TO THE PROCEEDING

The Petitioners are the Government of the United States Virgin Islands ("Government") and Roy Martin ("Martin"), in his official capacity as Tax Assessor of the Virgin Islands (collectively, "Petitioners"). The Respondents are Bluebeard's Castle, Inc. and Castle Acquisitions, Inc. (collectively, "Respondents"). Equivest St. Thomas, Inc., the Plaintiff named in the district court decision, is a corporation formed by the merger of the two Respondents.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully request this Court to grant certiorari, vacate and remand the underlying February 28, 2003, decision of the United States Court of Appeals for the Third Circuit. The Third Circuit affirmed a preliminary injunction against Petitioners after finding federal question jurisdiction based solely on 48 U.S.C. § 1401a, which the Court of Appeals read as requiring taxes on real property in the United States Virgin Islands ("Virgin Islands") to "be computed on the basis of the actual value of such property." This decision cannot stand because § 1401a does not satisfy the implied private right of action standard set forth in *Gonzaga University v. Doe*, 536 U.S. 273 (2002), which this Court decided after the district court denied Petitioners' Motion to Dismiss for Lack of Subject Matter Jurisdiction. In the alternative, this Court should grant certiorari, vacate and remand the Third Circuit's decision because Congress repealed § 1401a when it enacted the Revised Organic Act of 1954, as amended, 48 U.S.C. §§ 1541-1645.

OPINIONS BELOW

The decision of the United States District Court of the Virgin Islands denying with prejudice Petitioners' Motion to Dismiss for Lack of Subject Matter Jurisdiction and granting, in part, Respondents' motion for a preliminary injunction is reported at 208 F. Supp. 2d 545 (App. 17-32). The decision of the Third Circuit affirming the district court's finding of subject matter jurisdiction is reported at

321 F.3d 394 (App. 1-16). That opinion is now presented for review by this Petition for a Writ of Certiorari.

JURISDICTION

The Third Circuit entered judgment on February 28, 2003, and denied the Government's petition for rehearing *en banc* on March 26, 2003. Petitioners file this Petition for a Writ of Certiorari within 90 days of such denial. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case concerns at least three federal statutes: (1) the Act of May 26, 1936, ch. 450, 49 Stat. 1372, 48 U.S.C. §§ 1401, 1401a, and 1401b; (2) the Revised Organic Act of 1954, as amended, 68 Stat. 497, 48 U.S.C. §§ 1574 and 1612; and (3) the Civil Rights Act of 1871, Rev. Stat. § 1979, as amended, 42 U.S.C. § 1983. The pertinent texts of these federal statutes are set forth in the Appendix at App. 128-136.

STATEMENT OF THE CASE

Respondents allege that their year 2000 property tax assessments by the Virgin Islands Tax Assessor violate local territorial law, 33 V.I. Code Ann. § 2404, and an arcane federal statute enacted almost seventy years ago to address then-perceived deficiencies in Danish colonial real property tax laws, 48 U.S.C. § 1401a. Petitioners moved to dismiss the complaint for want of federal subject matter

jurisdiction due to the absence of a federal question. That motion was denied and, on appeal, the Third Circuit held that § 1401a creates a private right of action permitting Respondents to challenge their tax assessments. The Court of Appeals, however, did not apply the proper implied right of action standard under the Court's recent *Gonzaga University* decision. Nor did the Court of Appeals address the fact that Congress repealed § 1401a when it enacted inconsistent legislation that granted the Virgin Islands full autonomy to govern local issues such as real property taxation.

The Third Circuit's errors have already had a devastating impact on the Virgin Islands' economy. On May 12, 2003, the district court on remand acted without subject matter jurisdiction to issue a Decree prohibiting the Government from: (1) "assessing any and all real property in the Virgin Islands"; (2) issuing "any property tax bills for tax year 2002 and beyond"; and (3) making any "further effort to collect any tax bills already issued for any property, commercial or otherwise, for tax years 1999, 2000, and 2001[.]" *Berne Corp. v. Gov't of the V.I.*, ___ F. Supp. 2d ___, 2003 WL 21078073, at *29 (D.V.I. May 12, 2003) (consolidated case) (App. 121-122).[1] This Decree, if not vacated, will deprive the Government of more than $50

[1] The permanent injunction will continue until: (1) the Virgin Islands' "property tax system has been certified as reliably and credibly assessing and taxing all real property at its actual value," (2) "the Board of Tax Review consistently holds hearings and reaches determinations on appeals within sixty (60) days," and (3) "the Department of Finance consistently remits any refunds awarded by the Board decision within thirty (30) days[.]" *Berne Corp.*, 2003 WL 21078073, at *29 (App. 121).

million of tax revenue this year during one of the most serious fiscal crises faced by state, territorial and local governments since World War II. Accordingly, intervention by this Court is necessary to restore the statutorily-mandated balance between the Virgin Islands Government and the federal courts.

A. Pertinent History of Congressional Oversight of the Virgin Islands

The United States purchased all of the state-owned land in the Virgin Islands (*i.e.*, St. Thomas, St. John and St. Croix) from Denmark in 1916. *See Club Comanche, Inc. v. Gov't of the V.I.*, 278 F.3d 250, 256 (3d Cir. 2002) (citing Convention Between United States and Denmark, 39 Stat. 1706 (signed Aug. 4, 1916; ratified Jan. 16, 1917)). Pursuant to its authority under the United States Constitution to establish "all needful Rules and Regulations respecting the Territory or other Property belonging to the United States," U.S. Const. art. IV, § 3, cl. 2, Congress passed the Act of Congress March 3, 1917 ("Act of 1917"), *see* Act of Mar. 3, 1917, ch. 171, 39 Stat. 1132.

The Act of 1917 "continued the force and effect of all local laws imposing taxes, so far as compatible with the change in sovereignty, until Congress provided otherwise." *Danbury, Inc. v. Olive*, 820 F.2d 618, 620 (3d Cir. 1987) (citing 48 U.S.C. § 1395). The Danish laws providing for the assessment of real property taxes remained in force until 1922 in the Municipality of St. Thomas and St. John, when they were repealed. *See Ricardo v. Ambrose*, 211 F.2d 212, 215 (3d Cir. 1954). In the Municipality of St. Croix, however, the Danish property tax laws remained in force until 1936. *See id.* at 216.

By 1936, it became clear that the real property tax laws in the two municipalities were "unsatisfactory." *Id.* at 216. The tax system for the Municipality of St. Thomas and St. John had "separate classifications of cultivated land, pasture land and bush land." *Id.* Uncultivated land was taxed at the lowest rate, thus "penaliz[ing] the cultivation of land and tend[ing] to keep it idle and in the hands of a few landowners." *Id.* Moreover, the "tax rate of 1% did not provide adequate revenue for the municipality." *Id.* The Danish tax laws governing St. Croix were "equally unsatisfactory." *Id.* Because "[r]ecommendations by the Governor to the Colonial Councils to enact improved tax laws brought no action," *id.*, the Governor of the Virgin Islands and the United States Department of Interior asked Congress to enact a tax statute for the Virgin Islands, *Ricardo v. Ambrose*, 110 F. Supp. 716, 718 (D.V.I. 1953), *aff'd*, 211 F.2d 212 (3d Cir. 1954). *See also* S. Rep. No. 74-1973, at 1-6 (1936).[2]

In response to that request, Congress intervened in local taxation issues and passed the Act of May 26, 1936, ch. 450, 49 Stat. 1372 (codified at 48 U.S.C. §§ 1401-1401e). The Act of May 26, 1936 set forth a uniform system of property tax valuation to be used throughout the Virgin Islands. *See* 48 U.S.C. § 1401 ("It is the policy of Congress to equalize and more equitably to distribute existing taxes on real property in the Virgin Islands of the United States and to reduce the burden of taxation now

[2] In 1931, the President of the United States transferred jurisdiction of the Virgin Islands from the Department of the Navy to the Department of the Interior. *See* Exec. Order No. 5566, *available in* 2 Proclamations and Executive Orders: Herbert Hoover 792-93 (1974).

imposed on land in productive use in such islands."). Section 2 of the Act of May 26, 1936, the statute at issue in this proceeding that is codified at 48 U.S.C. § 1401a, required all taxes on real property in the Virgin Islands to be computed on the basis of "actual value":

> For the calendar year 1936 and for all succeeding years *all taxes on real property in the Virgin Islands shall be computed on the basis of the actual value of such property* and the rate in each municipality of such islands shall be the same for all real property subject to taxation in such municipality whether or not such property is in cultivation and regardless of the use to which such property is put.

48 U.S.C. § 1401a (emphasis added). Nowhere did § 1401a provide for a private right of action under which Virgin Islands taxpayers or anyone else could sue in federal court to challenge their tax assessments. Nor did § 1401a grant any rights to any identifiable class of individuals. To the contrary, Congress enacted § 1401a to provide the Virgin Islands with more tax revenue. S. Rep. No. 74-1973, at 2, 4, 6 (1936).

Barely one month after it passed the Act of May 26, 1936, Congress enacted the Organic Act of June 22, 1936 ("Organic Act of 1936"), which "provided a complete government – including a Legislative Assembly" for the Virgin Islands. *Granville-Smith v. Granville-Smith*, 349 U.S. 1, 7 (1955). Although the Organic Act of 1936 introduced a system of governance that applied to the entire Virgin Islands, it continued to treat the Municipality of St. Thomas and St. John and the Municipality of St. Croix as separate political bodies. *See* Act of June 22, 1936, ch. 699, §§ 2, 40, 49 Stat. 1801. After almost two decades, however,

it became clear that the Organic Act of 1936 was "unnecessarily cumbersome and inefficient." *Virgo Corp. v. Paiewonsky*, 384 F.2d 569, 576 (3d Cir. 1967). Such inefficiency was inevitable given that the Organic Act of 1936 was "based in no small part on the old Danish colonial system in the islands, which was evolved before the days of modern communication." *Id.* (quoting S. Rep. No. 83-1271, at 1, 2 (1954), *reprinted in* 1954 U.S.C.C.A.N. 2585, 2585-86.).

Accordingly, in 1954, Congress enacted the Revised Organic Act of 1954 to address the problems with the Organic Act of 1936. *See* Pub. L. No. 90-496, 68 Stat. 497 (48 U.S.C. §§ 1541-1645). "The Revised Organic Act of 1954 declared the Virgin Islands to be an unincorporated territory, and completely reorganized its government, abolishing the two existing municipalities with their separate municipal councils and joint legislative assembly, and creating a single territorial government with a single legislature." *Virgo Corp.*, 384 F.2d at 576. This Act thus provided "a greater degree of autonomy, economic as well as political, to the people of the Virgin Islands," *id.* (citation omitted), including "the power to pass legislation having 'local application,'" *Granville-Smith*, 349 U.S. at 9. In light of this grant of new autonomy, "the Revised Organic Act of 1954 operated to repeal the Organic Act of 1936." *Virgo Corp.*, 384 F.2d at 576-77. To this day, the amended Revised Organic Act of 1954 (as opposed to the Organic Act of 1936 or the Act of 1917) serves "as the Constitution of the Virgin Islands[.]" *Callwood v. Enos*, 230 F.3d 627, 630 (3d Cir. 2000). Not surprisingly, therefore, the Revised Organic Act of 1954 abrogated all "laws of the United States applicable to the Virgin Islands on

July 22, 1954" that are inconsistent with the Act and its amendments – including § 1401a. 48 U.S.C. § 1574(c).

The Revised Organic Act of 1954 has been amended on several occasions, each time to expand further the Virgin Islands' autonomy in a manner inconsistent with the Act of May 26, 1936 and the Organic Act of 1936. In 1958, Congress, reacting to the ruling of this Court in *Granville-Smith* that narrowly construed the Virgin Islands' legislative authority under the 1954 mandate, expanded the Virgin Islands' legislative charter to include "all rightful subjects of legislation not inconsistent with this chapter or the laws of the United States made applicable to the Virgin Islands." Virgin Islands Revised Organic Act-Amendments, Pub. L. No. 85-851 § 2, 72 Stat. 1094 (1958) (codified at 48 U.S.C. § 1574(a)). Congress intended the revision to broaden the Territory's legislative power to "'the ordinary area of sovereign legislative power' limited only by the provisions of the Revised Organic Act and the laws of the United States made applicable to the Virgin Islands." *Virgo Corp.*, 384 F.2d at 579 (quoting S. Rep. No. 85-2267 at 2 (1958), *reprinted in* 1958 U.S.C.C.A.N. 4334, 4335).

Since 1958, Congress has continued to expand and refine the Government's authority to legislate its own affairs. Most notably, in 1968, Congress passed the Elective Governor Act of 1968, Pub. L. No. 90-496, 82 Stat. 837 (1968), which authorized local elections for a Virgin Islands governor and eliminated the Presidential veto of local legislation. In 1984, Congress then "set in motion a restructuring of the Virgin Islands judicial system," *Callwood*, 230 F.3d at 631, by limiting the jurisdiction of the United States District Court for the Virgin Islands to

"general original jurisdiction in all causes in the Virgin Islands *the jurisdiction over which is not then vested by local law in the local courts of the Virgin Islands*[,]" 48 U.S.C. § 1612(b) (emphasis added).[3] This statute gave the Virgin Islands Legislature "the power to vest jurisdiction over local actions exclusively in the local courts." *Callwood*, 230 F.3d at 631; *see also Brow v. Farrelly*, 994 F.2d 1027, 1035 (3d Cir. 1993) (confirming that Congress' "ultimate intention was to divest the District Court of jurisdiction over local causes of action") (citation omitted). Pursuant to this authority, the Virgin Islands Legislature enacted 4 V.I. Code Ann. § 76(a), which, as of October 1, 1991, required "all civil actions that are based on local law and that do not satisfy diversity jurisdiction requirements [to be] brought in the Territorial Court of the Virgin Islands, with a few exceptions" not relevant to the instant case. *Callwood*, 230 F.3d at 631. In 1994, the Legislature also vested the Territorial Court with exclusive jurisdiction over all local crimes that do not relate to federal crimes. *Id.*; *see also* 48 U.S.C. § 1612(c); 4 V.I. Code Ann. § 76(b).

The current federal statutory scheme governing the Virgin Islands, therefore, is a far cry from its nascent state in 1936 – when Congress was asked to intervene in local government affairs because the Territory was perceived to be incapable of proper self-governance:

> The Territory of the Virgin Islands is a body politic. While not sovereign, in the true sense of that

[3] 48 U.S.C. § 1612(a) "affirmatively bestows on the District Court of the Virgin Islands the entire jurisdiction of a District Court of the United States." *Walker v. Gov't of the V.I.*, 230 F.3d 82, 86 (3d Cir. 2000).

> term, *the Revised Organic Act has conferred upon it attributes of autonomy similar to those of a sovereign government or a state.*

Gov't of the V.I. v. Bryan, 818 F.2d 1069, 1072 (3d Cir. 1987) (emphases added) (citation omitted); *see also Water Isle Hotel and Beach Club, Ltd. v. Kon Tiki St. Thomas, Inc.*, 795 F.2d 325, 327 (3d Cir. 1986) ("Congress has steadily increased the scope of self-government granted to the Virgin Islands."); *Harris v. Boreham*, 233 F.2d 110, 113 (3d Cir. 1956) (holding that "aim of Congress" was to delegate "full power of local self-determination").

B. The Opinions Below

On August 31, 2001, Respondents, commercial property owners, filed an action to enjoin Petitioners under the United States Constitution, as well as Petitioner Martin under 42 U.S.C. § 1983, from assessing and collecting real property taxes on Respondents' commercial property in the Virgin Islands other than in strict accordance with the "actual value" method set forth in 48 U.S.C. § 1401a and 33 V.I. Code Ann. § 2404.[4] *See Equivest St. Thomas, Inc. v. Gov't of the V.I.*, 208 F. Supp. 2d 545, 546 (D.V.I. 2002) (App. 17). Respondents alleged that the total assessed value of their three commercial properties exceeded the

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[4] Respondents also alleged supplemental jurisdiction under 5 V.I. Code Ann. § 80, which provides: "A taxpayer may maintain an action to restrain illegal or unauthorized acts by a territorial officer or employee, or the wrongful disbursement of territorial funds." 5 V.I. Code Ann. § 80. This statute, however, does not provide an independent basis for federal subject matter jurisdiction. *See, e.g., Harris*, 233 F.2d at 113 ("The local laws enacted under the legislative power granted by Congress are . . . territorial laws, not laws of the United States.").

"actual value" of these properties. *See id.* at 547 (App. 18-19).

Petitioners moved to dismiss the complaint for lack of subject matter jurisdiction on the ground that Virgin Islands property taxes are governed solely by 33 V.I. Code Ann. § 2404, not 48 U.S.C. § 1401a. *See id.* (App. 20). The district court denied Petitioners' motion and found that § 1401a continues to govern local real property assessments: "As Congress has lawfully imposed upon the Virgin Islands under section 1401a the requirement to assess real property according to its actual value *and section 1401a is still controlling in this jurisdiction,* I find that the plaintiff and its complaint are properly before this Court." *Id.* at 548 (emphasis added) (App. 21).

In denying Petitioners' motion to dismiss, the district court relied on its related decision in *Berne Corporation v. Government of the Virgin Islands*, 120 F. Supp. 2d 528 (D.V.I. 2000), which held that § 1401a confers a private right of action because it: (1) "creates a binding obligation on the Virgin Islands to assess property taxes using the 'actual value' of the real property"; (2) "creates an interest, the use of 'actual value' for computation of property taxes, which is sufficiently specific to be judicially enforceable"; and (3) "clearly was intended to benefit taxpayers by creating uniformity of taxation and reducing the burdens of taxation on land (and thus landowners such as plaintiffs) in productive use." *Id.* at 534-35 (citations omitted) (App. 42-45).[5] The district court also relied on its analysis

[5] The district court based this analysis on the Court's decisions in *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103 (1989), and *Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498 (1990). As discussed below,

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in *Berne Corporation* to "find[] that section 1401a creates a federally protected right actionable [against Martin] under [42 U.S.C. §] 1983." *Equivest*, 208 F. Supp. 2d at 548 n.6 (App. 21-22) (citing *Berne Corp.*, 120 F. Supp. 2d at 533-34 (App. 40-42)). The district court then preliminarily enjoined Petitioners "from collecting property taxes against the hotel properties owned by [Respondents] until the tax assessor can establish at a trial on the merits that the property taxes on those properties have been assessed on their actual value in accordance with 48 U.S.C. § 1401a and 33 V.I. Code Ann. § 2404[.]" *Id.* at 553.

The Third Circuit affirmed the district court's decision that it had federal subject matter jurisdiction under § 1401a. *See Bluebeard's Castle, Inc. v. Gov't of the V.I.*, 321 F.3d 394, 402 (3d Cir. 2003) (App. 13-15). The Court of Appeals, which assumed the continued viability of § 1401a, found that the passage of this section "contemplate[d] a hybrid scheme of real property law: the general requirements are set by the federal government, with specifics established as a matter of territorial law consistent with federal law." *Id.* at 398 (App. 7). In light of the significant autonomy granted by Congress to the Virgin Islands, however, the Third Circuit initially was reluctant to find that § 1401a conferred on Respondents a private right of action:

> [A]lthough § 1401a adds a significant federal element to the Virgin Islands tax regime, it remains a local system – created, enforced, and

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this Court recently clarified the import of these decisions in *Gonzaga University* when it held that a statute is presumed to grant no private right of action unless such a right is "unambiguously conferred" by Congress. 536 U.S. at 283-84.

> adjudicated locally. While federalism principles do not apply directly as a result of the Virgin Islands' sovereignty, sensitivity to the division between federal and territorial power in this area seems appropriate, given Congress's choice to treat Virgin Islands law – including its taxation regime – with much of the independence of state law. *This counsels in favor of eschewing a broad interpretation of the federal rights created by § 1401a that are justiciable in District Court.*

Id. at 401 (emphasis added) (App. 12). The Court of Appeals – which agreed that the federal courts lack jurisdiction over "a purely local tax question" – nonetheless held that § 1401a provided Respondents with a federal private right of action. This holding was based solely on the allegation that the tax assessor allegedly uses an assessment "*method*" that may not determine the "actual value" of real property: "Plaintiff here claims the government violated § 1401a. It could do so apart from a territorial cause of action to challenge the tax assessments. In this particular case, federal law 'creates the cause of action.'" *Id.* at 401-02 (emphasis in original) (citation omitted) (App. 12-15).[6] Although this Court had decided *Gonzaga University* more than eight months before the Third Circuit's decision, the Court of Appeals did not apply the

[6] Petitioners dispute the Third Circuit's characterization of the tax assessor's "method" used to determine "actual value" – a determination that can be very complicated. The local real property statute at issue, 33 V.I. Code Ann. § 2404, allows the Government to take various factors into account. The underlying dispute concerns the proper approach under § 2404 to determine "actual value" for the commercial real property at issue. The merits of this dispute over local issues of property taxation, however, are not before the Court.

Gonzaga University "clear and unambiguous terms" private right of action test, 536 U.S. at 290, nor did it even cite *Gonzaga University* in finding the existence of subject matter jurisdiction. Instead, as discussed below, the Third Circuit applied a test rejected by this Court: "Because plaintiff's claims 'arise under' § 1401a, they are subject to the jurisdiction of the District Court under 48 U.S.C. § 1612 and 28 U.S.C. § 1331." 321 F.3d at 402 (App. 14).

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari, vacate the judgment below, and remand this case ("GVR") to the Third Circuit with instructions to dismiss the case for lack of subject matter jurisdiction.[7] The Third Circuit found that the district court had subject matter jurisdiction to decide this case because Respondents' claims against Petitioners purportedly "arise under" § 1401a. 321 F.3d at 402 (App. 14). The Third Circuit's decision cannot stand in light of this Court's recent decision in *Gonzaga University*, in which the Court "rejected the notion that [its] cases permit anything short of an unambiguously conferred [statutory]

[7] The Court's authority to GVR a case arises under 28 U.S.C. § 2106: "The Supreme Court or any other court of appellate jurisdiction . . . may vacate . . . any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and . . . require such further proceedings to be had as may be just under the circumstances." This authority has "become an integral part of this Court's practice, accepted and employed by all sitting and recent Justices." *Lawrence v. Chater*, 516 U.S. 163, 166 (1996); *see also Gov't of the V.I. v. JDS Realty Corp.*, 484 U.S. 999 (1988) (issuing GVR order in Virgin Islands excise tax case).

right to support" an implied right of action sufficient to confer federal subject matter jurisdiction. 536 U.S. at 283; *see also Face v. Nat'l Home Equity Mortg. Ass'n*, ___ U.S. ___, 123 S. Ct. 69 (2002) (ordering a GVR to address *Gonzaga University*).

Apart from the lack of a private right of action to support federal subject matter jurisdiction, the Third Circuit's finding of subject matter jurisdiction under § 1401a attempts to resurrect that long-since buried statute from the dead. The Third Circuit's summary conclusion that the Government continues to be bound by Congressional legislation passed when the Virgin Islands was governed by two distinct municipalities applying Danish law – almost two decades *before* Congress created a Virgin Islands Legislature to impose self-government – essentially revokes, in the sphere of real property taxation, the autonomy delegated by Congress to the Virgin Islands under the Revised Organic Act of 1954 and its amendments. As discussed below, Respondents cannot establish federal subject matter jurisdiction because § 1401a has been repealed by the Revised Organic Act of 1954, as amended.

A GVR order is appropriate here because, as this Court has emphasized, subject matter jurisdiction must be resolved as a threshold matter in every federal appeal:

> "On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it." . . . The requirement that jurisdiction be established as a

> threshold matter "spring[s] from the nature and limits of the judicial power of the United States" and is "inflexible and without exception."

Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94-95 (1998) (citations omitted); *see also GAF Corp. v. Cheng*, 472 U.S. 1023 (1985) ("Certiorari granted, judgment vacated, and case remanded to the Court of Appeals with instructions to dismiss the appeal for want of jurisdiction."). The question of subject matter jurisdiction under § 1401a is of critical importance because the district court, on remand, already has entered a permanent injunction against Petitioners on the merits based on a finding that this repealed statute confers a private right of action (under 42 U.S.C. § 1983 as to Petitioner Martin, and under 5 V.I. Code Ann. § 80 as to both Petitioners). *Berne Corp.*, 2003 WL 21078073, at *7-8, 21-26 (App. 70-73, 104-115).[8]

[8] The district court also enforced a settlement entered in the pre-consolidated *Berne Corporation* case to ensure that real property in the Virgin Islands "is appraised, assessed and taxed at actual, market values in accordance with 48 U.S.C. § 1401a and the Uniform Standards of Professional Appraisal Practice." Respondents are not signatories to this settlement agreement. The district court nonetheless found that Petitioners "have extended the benefits of the *Berne* Settlement to all real property owners in the Virgin Islands[.]" *Berne Corp.*, 2003 WL 21078073, at *5-6, 28 (App. 62-67, 120). The district court found it unnecessary to reach Respondents' § 1983 claims against Martin based on the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. *Id.* at *19 n.23 (App. 99).

A. SECTION 1401a CANNOT PROVIDE THE BASIS FOR FEDERAL SUBJECT MATTER JURISDICTION BECAUSE IT DOES NOT GIVE RISE TO AN UNAMBIGUOUSLY CONFERRED PRIVATE RIGHT OF ACTION AND REMEDY.

This Court should grant the petition, vacate the Third Circuit's decision and remand the case with instructions to dismiss in light of this Court's decision in *Gonzaga University* because § 1401a does not unambiguously confer a private right of action and remedy. In *Gonzaga University*, this Court held that a student could not sue a private university under 42 U.S.C. § 1983 to enforce provisions of the Family Educational Rights and Privacy Act of 1974, 88 Stat. 571, 20 U.S.C. § 1232g, because the pertinent provisions of that Act did not "make out the requisite congressional intent to confer individual rights enforceable by § 1983." *Gonzaga Univ.*, 536 U.S. at 289. Although *Gonzaga University* was a § 1983 case, the Court "resolved any ambiguity in [its] own opinions" by holding that if Congress wishes to create new rights enforceable *either* through a direct private right of action *or* under § 1983, Congress "must do so in clear and unambiguous terms." *Id.* at 278, 290; *see also id.* at 285 ("A court's role in discerning whether personal rights exist in the § 1983 context should therefore not differ from its role in discerning whether personal rights exist in the implied right of action context.").

When construing whether a statute implies a private right of action, a federal court must first determine "whether or not Congress intended to confer individual rights upon a class of beneficiaries." *Id.* at 285. To that end, *Gonzaga University* requires courts conducting a private right of action inquiry to evaluate whether the

provision in question contains "the sort of 'rights-creating' language critical to showing the requisite congressional intent to create new rights." *Id.* at 287. "For a statute to create such private rights, its text must be 'phrased in terms of the persons benefited.'" *Id.* at 284. That is, the statutory language must be "individually focused" on those protected, and not focused on those regulated. *Id.*; *see also id.* at 284 n.3 ("Where a statute does not include this sort of explicit 'right- or duty-creating language' we rarely impute to Congress an intent to create a private right of action."); *Alexander v. Sandoval*, 532 U.S. 275, 289 (2001) ("Statutes that focus on the person regulated rather than the individuals protected create 'no implication of an intent to confer rights on a particular class of persons.'").

Instead of addressing pertinent precedent, the Third Circuit summarily found that § 1401a conferred a private right of action on Respondents: "In this particular case, federal law 'creates the cause of action.'" 321 F.3d at 402 (quoting *Am. Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916)) (App. 14-15). The Third Circuit's reliance on this Court's decision in *American Well Works Company* is misplaced. The plaintiff in that case filed a state-court action alleging that the defendant's claim of patent infringement was injuring the plaintiff's business. The defendant removed the action to federal court on the ground that "the cause of action arose under the patent laws of the United States." 241 U.S. at 258. The Court disagreed: "A suit for damages to business caused by a threat to sue under the patent law is not itself a suit under the patent law." *Id.* at 259. In explaining its holding, the Court noted that "[w]hat makes the defendants' act a wrong is its manifest tendency to injure the plaintiff's business; and the wrong is the same whatever the means

by which it is accomplished. But whether it is a wrong or not depends upon the law of the state where the act is done, not upon the patent law, and therefore the suit arises under the law of the state. A suit arises under the law that creates the cause of action." *Id.* at 260. The holding in *American Well Works Company*, therefore, has no bearing on whether § 1401a or, for that matter, any federal statute, confers a private right of action.

The Third Circuit's finding of federal subject matter jurisdiction thus rests entirely on its incorrect view that an alleged violation of § 1401a is sufficient to establish a federal *right* under that provision. This holding falls far short of satisfying the strict standard set forth in *Gonzaga University* and other decisions by the Court. *Compare* 321 F.3d at 402 (App. 15) ("Because plaintiff has properly alleged a violation of a federal requirement, it has stated a federal claim in the United States District Court for the District of the Virgin Islands."), *with Touche Ross & Co. v. Reddington*, 442 U.S. 560, 568 (1979) ("As we recently have emphasized, 'the fact that a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person.'") (quoting *Cannon v. Univ. of Chicago*, 441 U.S. 677, 688 (1979)), *and Gonzaga Univ.*, 536 U.S. at 284 ("'The question whether Congress . . . intended to create a private right of action [is] definitively answered in the negative' where 'a statute by its terms grants no private rights to any identifiable class.' . . . For a statute to create such private rights, its text must be 'phrased in terms of the persons benefited.'").

Had the Third Circuit engaged in the pertinent inquiry, it would have had to conclude that § 1401a confers no private right on any identifiable class "in clear and unambiguous terms." *Gonzaga Univ.*, 536 U.S. at 290. To the contrary, Congress enacted § 1401a because Virgin Islands landowners were benefiting too much under the prior tax system, and there was "little probability that an equitable assessed valuation property tax could be got through the local legislatures." S. Rep. No. 74-1973, at 6 (1936); *see also Ricardo*, 211 F.2d at 216 ("Recommendations by the Governor to the Colonial Councils to enact improved tax laws brought no action."). The pertinent legislative history further explains that Congress primarily intended to provide the Virgin Islands with sufficient tax income, as opposed to conferring a private right of action to an "identifiable class" comprised of Virgin Islands landowners:

> One of the things that has impressed all investigators is that the tax system needs revision. The Joint Commission of 1920 chronicled the fact that they found 'the system of taxation in the islands unjust, inefficient, and archaic.' *They recommended that the entire system be reformed with a view to securing a greater income* and with a view to equalizing the burdens of taxation.

S. Rep. No. 74-1973, at 4 (1936) (emphasis added); *see also id.* at 8 ("The most important and pressing problem for the municipality of St. Croix is for additional funds to maintain its existing institutions such as schools, hospitals, medical institutions, etc."). Indeed, Congress was urged to pass the Act of May 26, 1936 with haste "in order that assessment at the new rate [of 1.25% in § 1401b] might be made in time to allow the 1936 taxes to be collected by June 30, 1937." *Ricardo*, 110 F. Supp. at 718.

In this case, Respondents are members of the class Congress intended to *bear the burdens* of a uniform real property tax system based on "actual value" assessments that would benefit the Virgin Islands as a whole. Although Respondents arguably are benefited by the requirement in § 1401a that real property be assessed at "actual value," the Court should "keep in mind that the question whether a statute is *intended to benefit* particular plaintiffs is quite different from the question whether the statute *in fact benefits* those plaintiffs or even whether Congress *knew* that the statute would benefit those plaintiffs." *Pa. Pharms. Ass'n v. Houstoun*, 283 F.3d 531, 535-36 (3d Cir. 2002) (en banc) (emphases in original); *see also Alexander*, 532 U.S. at 289.[9]

Even assuming, *arguendo*, that § 1401a creates a private right of action for Virgin Islands landowners (which it does not), "a plaintiff suing under an implied right of action still must show that the statute manifests an intent 'to create not just a private *right* but also a private *remedy*.'" *Gonzaga Univ.*, 536 U.S. at 284 (emphases in original). The Third Circuit failed to address how

[9] Virgin Islands landowners are not left without a remedy for alleged tax assessments over "actual value." To the extent landowners believe that the Government did not properly assess their property under 33 V.I. Code Ann. § 2404 (which, consistent with § 1401a, defines how "actual value of real property subject to taxation" should be computed), the landowners could bring, among other actions, a taxpayer suit in Territorial Court under 5 V.I. Code Ann. § 80, or Writ of Review under 5 V.I. Code Ann. § 1421.

§ 1401a provides a private remedy against the Government for a direct cause of action under that provision. Although 42 U.S.C. "§ 1983 generally supplies a remedy for the vindication of rights secured by federal statutes[,]" *id.* at 284, the Government is not subject to § 1983. *See Ngiraingas v. Sanchez*, 495 U.S. 182, 192 (1990) ("Congress did not intend to include Territories as persons who would be liable under § 1983"). In the end, the Third Circuit erred when concluding that the district court has jurisdiction to enjoin Petitioners based on what amounts to mere alleged violations of Territorial tax laws.[10]

B. SECTION 1401a CANNOT PROVIDE THE BASIS FOR FEDERAL SUBJECT MATTER JURISDICTION BECAUSE IT HAS BEEN REPEALED BY THE REVISED ORGANIC ACT OF 1954.

This Court should also grant certiorari, vacate and remand the Third Circuit's decision because Congress has repealed § 1401a, the sole statute upon which the lower

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[10] The Third Circuit did not specifically address whether it had subject matter jurisdiction to hear Respondents' claim against Martin under 42 U.S.C. § 1983. Nevertheless, such a claim necessarily would fail because it must be predicated on a private right of action under § 1401a. *See Berne Corp.*, 120 F. Supp. 2d at 533-35 ("[T]he Court concludes that 48 U.S.C. § 1401a creates a federally protected right actionable pursuant to 42 U.S.C. § 1983.") (App. 44-45). As this Court explained: "Once a plaintiff demonstrates that a statute confers an individual right, the right is presumptively enforceable by § 1983. But the initial inquiry – determining whether a statute confers any right at all – is no different from the initial inquiry in an implied right of action case, the express purpose of which is to determine whether or not a statute 'confer[s] rights on a particular class of persons.'" *Gonzaga Univ.*, 536 U.S. at 284-85 (quoting *Cal. v. Sierra Club*, 451 U.S. 287, 294 (1981)) (footnote omitted).

courts found federal subject matter jurisdiction. The history of Congressional oversight of the Virgin Islands establishes that § 1401a has been repealed.

The Revised Organic Act of 1954 abrogated all "laws of the United States applicable to the Virgin Islands on July 22, 1954" that are inconsistent with the Act and its amendments. 48 U.S.C. § 1574(c). The Third Circuit broadly construed this provision to repeal virtually the entire Organic Act of 1936:

> It is, of course, clear that those provisions of the Act of 1936 which were inconsistent with provisions of the Revised Organic Act were repealed by implication by the latter Act. *It is equally true, we believe, that those provisions of the old Act which dealt with and limited the powers of organs of the former municipalities, such as the municipal councils, fell with the abolition of the organs of government to which they related.*

Virgo Corp., 384 F.2d at 577 (emphasis added).

The Court of Appeals explained that adherence to outdated laws from 1936 would unduly "shackle" the new Virgin Islands Legislature with laws that pertained to, and restricted, the abolished municipal councils:

> There is no reason to believe that the Congress, which was intent on providing a greater degree of autonomy to the people of the territory through a newly created territorial legislature, intended to shackle that legislature with restrictions which had been placed in 1936 upon the municipal councils as the direct successors of the old Danish colonial councils but which the Congress had omitted from the revised Act.

Id. Section 1401a – a provision in the Act of May 26, 1936 passed one month *before* the repealed Organic Act of 1936 – similarly reflects an era in Virgin Islands' history when Congress' guidance was necessary to remedy a defective predecessor legislative system. The restrictions imposed under § 1401a, like those under the Organic Act of 1936, are inconsistent with the Revised Organic Act of 1954 and, therefore, were repealed under § 1574(c).[11]

This repeal by implication became more pronounced in 1958, when Congress amended the Revised Organic Act of 1954 § 8(a) to extend further the "authority and power" of the Virgin Islands Legislature to "all rightful subjects of legislation not inconsistent with this chapter or the laws of the United States made applicable to the Virgin Islands." 48 U.S.C. § 1574(a). This amendment "broaden[ed] the legislative power of the Virgin Islands to cover 'the ordinary area of sovereign legislative power' limited *only* by the provisions of the Revised Organic Act and the laws of the United States made applicable to the Virgin Islands." *Virgo Corp.*, 384 F.2d at 579 (quoting S. Rep. No. 85-2267,

[11] In Revised Organic Act of 1954 § 8(e), Congress directed the Secretary of the Department of the Interior to arrange for the preparation of the Virgin Islands Code to constitute "a consolidation, codification and revision of the local ordinances in force in the Virgin Islands." 68 Stat. 500, *repealed by* Act of Oct. 19, 1982, Pub. L. No. 97-357, Title III, § 305, 96 Stat. 1709. Subtitle 2 of Title 33 of this Virgin Islands Code prepared by the Code Advisory Committee created by Secretary of the Department of Interior in 1955, submitted by the Federally-appointed Governor, and enacted by the Virgin Islands Legislature on May 16, 1957, superseded the Act of May 26, 1936, and created the purely local property tax system presently set forth in Title 33 of the Virgin Islands Code.

85th at 2 (1958), *reprinted in* 1958 U.S.C.C.A.N. 4334, 4335) (emphasis added).[12]

This 1958 amendment rendered clear Congress' intent to remove the "shackle[s]" imposed by § 1401a and similar outdated federal statutes that restricted the governance of local issues. There is no basis to conclude that Congress intended to preserve § 1401a – a real property assessment law dating back to 1936 that was intended to remedy problems with tax revenues and land productivity that had long since been resolved – at the same time it intended to broaden the Virgin Islands Legislature's power to cover "the ordinary area of sovereign legislative power." To the contrary, Congress expressly left areas of "sovereign legislative power" that traditionally fall beyond the scope of federal law. including issues of real property assessments and taxation, to the Virgin Islands Legislature. *Cf. Nat'l Private Truck Council, Inc. v. Okla. Tax Comm'n*, 515 U.S. 582, 586 (1995) ("We have long recognized that principles of federalism and comity generally counsel that courts should adopt a hands-off approach with respect to state tax administration."); *Fair Assessment in Real Estate Ass'n, Inc. v. NcNary*, 454 U.S. 100, 116 (1981) (holding that principles of comity bar taxpayers from challenging "the validity of state tax systems in federal courts"). In short, Congress repealed the specific restrictions on local

[12] The Third Circuit in *Virgo Corporation* further explained that the phrase "laws of the United States made applicable to the Virgin Islands" in § 1574(a) merely refers to "those federal statutes applicable to the United States generally which, either by their own terms or by other legislation, are also made applicable to the Virgin Islands." 384 F.2d at 579. This phrase, therefore, cannot be read as preserving § 1401a.

governance set forth in § 1401a because they are inconsistent with the broad delegation of autonomy in the Revised Organic Act of 1954, as amended.

In any event, the Third Circuit explained that this analysis is not even necessary because, with limited exceptions not applicable here, Congress intended that *all* pre-Revised Organic Act of 1954 statutes be repealed:

> *We think . . . that in conferring upon the people of the Virgin Islands a new and up-to-date charter of government the Congress could not have intended at the same time to impose upon them the well-nigh impossible task of sorting out those provisions of the old Act which were so inconsistent with the new Act as to be repealed by it from those provisions of the old Act which were to remain in force because they were not sufficiently inconsistent with the new law.* The very fact that the Act of 1954 is described in its title as 'An Act to revise the Organic Act of the Virgin Islands of the United States' and in its first section as the 'Revised Organic Act of the Virgin Islands' indicates that it was intended to supersede and take the place of the Organic Act of 1936 and not merely to amend or repeal portions of it.

Virgo Corp., 384 F.2d at 577 (emphasis added) (footnotes omitted).

This conclusion by the Third Circuit is consistent with the legislative history of the Revised Organic Act of 1954, which further emphasizes that Congress essentially started from scratch when creating this "new organic act" or "basic contract" for Virgin Islands citizens:

> *The purpose of S. 3378 is to provide a new organic act, or basic charter of civil government, for*

> *the people of the Virgin Islands of the United States.* The present act dates from 1936 and is based in no small part on the old Danish colonial system in the islands, which was evolved before the days of modern communication. Substantial changes, political and economical, have taken place in the Virgin Islands in the 18 years since the first somewhat makeshift organic legislation was put together, and *under modern conditions the 1936 law is proving unnecessarily cumbersome and inefficient as well as expensive for the mainland taxpayers.*
>
> *S. 3378 would eliminate much of this wasteful duplication in governments and governmental services, thus affording the islands more efficient and more truly representative government. At the same time, it would give a greater degree of autonomy, economic as well as political, to the people of the Virgin Islands.*

Id. at 576 (emphases added) (quoting S. Rep. No. 83-1271, at 1, 2 (1954), *reprinted in* 1954 U.S.C.C.A.N. 2585, 2586).

The Third Circuit's opinion below – which does not address its prior holding in *Virgo Corporation*, the effect of the Revised Organic Act of 1954 and its amendments on § 1401a in particular, *or* the legislative history of that Act – provides no basis to support its assumption that § 1401a is still viable. Nor did the Court of Appeals provide any reason to believe that the governance restrictions in § 1401a can be reconciled with the autonomy granted by the Revised Organic Act of 1954, as amended. In sum, the Third Circuit allowed Respondents to invoke the jurisdiction of the federal courts based solely on a repealed tax statute enacted seventy (70) years ago and never

amended. This Court, therefore, should vacate the judgment below and remand this case to the Third Circuit with instructions to dismiss the case for lack of subject matter jurisdiction.

CONCLUSION

For the above reasons, Petitioners, the Government of the United States Virgin Islands and Roy Martin, in his official capacity as Tax Assessor, respectfully urge this Court to grant the petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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321 F.3d 394

United States Court of Appeals,
Third Circuit.

BLUEBEARD'S CASTLE, INC.; Castle Acquisitions, Inc.
v.
GOVERNMENT OF THE VIRGIN ISLANDS; Roy Martin, in his official capacity as Tax Assessor, Appellants

No. 02-2807.

Argued Nov. 8, 2002.
Filed Feb. 28, 2003.

Nandi Sekou, (Argued), Kerry E. Drue, Office of the Attorney General of the Virgin Islands, Department of Justice, Charlotte Amalie, St. Thomas, for Appellants.

Simone R.D. Francis, (Argued), *Chad C. Messier, William S. McConnell*, Dudley, Topper and Feuerzeig, LLP, Charlotte Amalie, St. Thomas, for Appellees.

Before *SCIRICA, ALITO* and *RENDELL*, Circuit Judges.

OPINION OF THE COURT

SCIRICA, Circuit Judge.

In this appeal involving the assessment of real property taxes in the United States Virgin Islands, we address the special relationship between federal and territorial law. The District Court enjoined the Virgin Islands tax assessor from employing a certain tax assessment method, concluding it violated federal law. Contending that any claims can only arise under territorial law, the Government of the Virgin Islands maintains the District Court lacked federal subject-matter jurisdiction. We hold that plaintiff has properly pled a federal claim.

I.

Plaintiff Equivest St. Thomas, Inc.[1] is a United States Virgin Islands corporation that owns commercial property in St. Thomas, Virgin Islands. Plaintiff challenges the tax assessment of three of its hotel resort properties, Bluebeard's Castle, Bluebeard's Beach Club, and the Elysian Resort. For the 2000 tax year, the Government of the Virgin Islands assessed these three properties at more than $98 million, resulting in a tax bill of approximately $740,000. Plaintiff contends the assessment greatly exceeds the properties' actual value of less than $40 million.

Federal statutory law, and its Virgin Islands corollary, mandate that Virgin Islands real property must be assessed at "actual value."[2] 48 U.S.C. § 1401a; 33 V.I.Code Ann. § 2404. According to defendant Virgin Islands Tax Assessor Roy Martin, the Virgin Islands primarily employed replacement-cost value and declaration value in assessing the properties, methods he conceded do not reflect fair market value. Plaintiff contends that reliance on replacement-cost and declaration value violates federal statutory and Virgin Islands law. Plaintiff brought this

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[1] Equivest is a corporation formed by the merger of the corporations listed in the caption, Bluebeard's Castle, Inc. and Castle Acquisition, Inc.

[2] For present purposes, we need not determine what constitutes actual value. We note, however, that historically, "[t]he phrases 'saleable value,' 'actual value,' 'cash value,' and others used in the directions of assessing officers, all mean the same thing, and are designed to effect the same purpose." *Cummings v. Merchants' Nat'l Bank*, 101 U.S. 153, 162, 25 L.Ed. 903 (1879).

action under 42 U.S.C. § 1983, seeking to enjoin defendants "from assessing real property taxes for commercial property in the Virgin Islands other than in strict accordance with 48 U.S.C. § 1401a and 33 V.I.C. § 2404."[3]

Finding that plaintiff was likely to prevail on the merits and had met the other requirements for preliminary relief, the District Court enjoined the Government of the Virgin Islands "from collecting property taxes against the hotel properties owned by Equivest St. Thomas, Inc. until the tax assessor can establish at a trial on the merits that the property taxes on those properties have been assessed on their actual value." *Equivest St. Thomas, Inc. v. Gov't of the V.I.*, 208 F.Supp.2d 545, 553 (D.Vi.2002).

At this time, the Government of the Virgin Islands does not contest the District Court's resolution of the merits. Instead, the government contends the District Court lacked jurisdiction because this dispute arises not under federal law, but solely under Virgin Islands law.[4]

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[3] Plaintiff also contends defendants are in breach of a settlement agreement reached in an earlier case governing Virgin Islands tax assessment. See *Berne Corp. v. Gov't of the V.I.*, 120 F.Supp.2d 528 (D.Vi.2000), for a discussion of that case.

[4] The Government of the Virgin Islands also argues the District Court abused its discretion in rejecting plaintiff's argument that the injunction should be denied because plaintiff lacks "clean hands." The government contends plaintiff failed to pursue avenues for relief within the Virgin Islands and insufficiently cooperated with Virgin Islands officials in this matter. We see no abuse of discretion.

II.

a.

Property taxes are generally governed by state law. As we discuss, the importance to the states of their tax systems is such that comity mandates that federal courts are ordinarily powerless to entertain challenges to state taxation, even under 42 U.S.C. § 1983. *Fair Assessment in Real Estate Assoc. v. McNary,* 454 U.S. 100, 116, 102 S.Ct. 177, 70 L.Ed.2d 271 (1981). But the Virgin Islands is not a state;[5] it is a territory subject to Congress's broad power under Article IV, section 3, clause 2 of the United States Constitution to govern territories.[6] *See Examining Bd. of Eng'rs, Architects and Surveyors v. Flores de Otero,* 426 U.S. 572, 587 n. 16, 96 S.Ct. 2264, 49 L.Ed.2d 65 (1975).

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[5] Were it a state, the District Court may have been subject to the prohibition on tax injunctions under the Tax Injunction Act, 28 U.S.C. § 1341, which provides, "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." Where applicable, the Tax Injunction Act implicates federal subject-matter jurisdiction. *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 470, 96 S.Ct. 1634, 48 L.Ed.2d 96 (1976); *Collins Holding Corp. v. Jasper County*, 123 F.3d 797, 799 (4th Cir.1997); *Cumberland Farms, Inc. v. Tax Assessor*, 116 F.3d 943, 945 (1st Cir. 1997). Nevertheless, we have held that the Tax Injunction Act does not apply to the Virgin Islands. *Pan Am. World Airways v. Gov't of the V.I.*, 459 F.2d 387, 391 (3d Cir.1972).

[6] Clause 2 of Article IV, section 3 provides:

> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

It is settled that Congress has sovereignty over the territories of the United States and accordingly has power to legislate for a territory with respect to all subjects upon which the legislature of a state might legislate within the state. *Simms v. Simms,* 1899, 175 U.S. 162, 168, 20 S.Ct. 58, 44 L.Ed. 115. It is also settled that Congress may delegate to a territory such of these powers as it sees fit. *Binns v. United States,* 1904, 194 U.S. 486, 491-492, 24 S.Ct. 816, 48 L.Ed. 1087; *Christianson v. King County,* 1915, 239 U.S. 356, 364-366, 36 S.Ct. 114, 60 L.Ed. 327. And the right of Congress to revise, alter and revoke these delegated powers does not diminish the powers while they reside in the territory. *Hornbuckle v. Toombs,* 1873, 18 Wall. 648, 85 U.S. 648, 655-656, 21 L.Ed. 966; *District of Columbia v. John R. Thompson Co.,* 1953, 346 U.S. 100, 106, 73 S.Ct. 1007, 97 L.Ed. 1480.

Harris v. Boreham, 233 F.2d 110, 113 (3d Cir. 1956). Accordingly, Congress undisputedly has constitutional authority to regulate property taxation in the territory of the Virgin Islands.

In 1936, Congress exercised this authority. In order "to equalize and more equitably to distribute existing taxes on real property in the Virgin Islands of the United States and to reduce the burden of taxation now imposed on land in productive use in such islands," 48 U.S.C. §§ 1401, Congress enacted a statute governing property taxes in the Virgin Islands. 48 U.S.C. §§ 1401-1401e. Section 1401a provides:

> For the calendar year 1936 and for all succeeding years all taxes on real property in the Virgin Islands shall be computed on the basis of the actual value of such property and the rate in each municipality of such islands shall be the same for

> all real property subject to taxation in such municipality whether or not such property is in cultivation and regardless of the use to which such property is put.

The general requirements of § 1401a are followed by the more specific requirements of § 1401b, which also recognizes a measure of self-governance over specific property tax requirements:

> Until local tax laws conforming to the requirements of sections 1401 to 1401e of this title are in effect in a municipality the tax on real property in such municipality for any calendar year shall be at the rate of 1.25 per centum of the assessed value. If the legislative authority of a municipality failed to enact laws for the levy, assessment, collection or enforcement of any tax imposed under authority of said sections, within three months after May 26, 1936, the President shall prescribe regulations for the levy, assessment, collection, and enforcement of such tax, which shall be in effect until the legislative authority of such municipality shall make regulations for such purposes.

This section created an interim tax rate and specified a source of interim regulations over the tax collection system. But these provisions were to apply only "until local tax laws conforming to the requirements of sections 1401 to 1401e of this title are in effect," with respect to the tax rate, and "until the legislative authority of [a] municipality shall make regulations for such purposes," with respect to tax collection and enforcement mechanisms.

The two sections fit together. Section 1401a provides general requirements for property taxation in the Virgin Islands – that taxes be uniformly assessed and that they

be "computed on the basis of the actual value" of the properties taxed. Section 1401b provides details that conform with the more general requirements of 1401a – setting tax rates and directing the President to prescribe regulations.[7] Both 1401b requirements are subject to change by local legislation, but they must "conform[ ] to the requirements of sections 1401 to 1401e" – including the general requirements in 1401a. The federal statute, therefore, contemplates a hybrid scheme of real property law: the general requirements are set by the federal government, with specifics established as a matter of territorial law consistent with federal law.[8]

b.

Plaintiff contends the Government of the Virgin Islands is subject to, and in violation of, § 1401a's requirement that "all taxes on real property in the Virgin Islands *shall* be computed on the basis of the *actual value*

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[7] President Roosevelt promulgated regulations in December 1936 applicable to St. Thomas and St. John. St. Croix had, by then, enacted its own property tax law, so it was not subject to these regulations. *Berne*, 120 F.Supp.2d at 532.

[8] Section 1401a's "actual value" and uniformity requirements are commonly found in state constitutions and statutes. *See, e.g.*, S. Car. Const. Art. III, § 29 ("Taxes laid upon actual assessed value."); Co. Const. Art. X, § 3 (specifying both uniformity and "actual value" assessment); W. Va. Const. Art. X, § 1 ("Subject to the exceptions in this section con-tained, taxation shall be equal and uniform throughout the State, and all property, both real and personal, shall be taxed in proportion to its value to be ascertained as directed by law."); Pa. Const. Art. VII, § 1 (Uniformity of Taxation). Thus, this structure does not set Virgin Islands property tax law apart from state property tax regimes. The difference is that federal law provides a part of the Virgin Islands property tax system that is often found within state tax systems.

of such property." (Emphasis added). In response, the government argues this section no longer applies because it has been superceded by Virgin Islands law.

The Government of the Virgin Islands contends the federal statute was supplanted in 1955 when the Virgin Islands Legislature[9] passed a real property assessment law, including 33 V.I.Code Ann. § 2404, which enumerates the factors to be considered in determining "actual value." In support, the Government of the Virgin Islands focuses primarily on the expiratory language in § 1401b, which limits application "until local laws ... are in effect." According to the government, this reveals the temporary nature of the 1936 act – whose effect ended with the passage of 33 V.I.Code Ann. § 2404.

But as noted, the expiratory language in S 1401b applies only to the specific requirements of that section; it does not apply to the rest of the statute, including the general requirements of § 1401a. Significantly, § 1401b expressly provides that the local measures enacted must also "conform[ ] to the requirements of sections 1401 to 1401e." A local tax law cannot conform to the requirements

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[9] The form of government in the Virgin Islands is defined by the Organic Act, originally passed by Congress in 1936, and subject to substantial revision in 1954, when it became known as the Revised Organic Act, and again in 1984. *See Estate Thomas Mall, Inc. v. Territorial Court of the V.I.*, 923 F.2d 258, 260-61 (3d Cir. 1991); *Virgo Corp. v. Paiewonsky*, 384 F.2d 569, 575-76 (3d Cir. 1967). The Revised Organic Act, 48 U.S.C. § 1541 *et seq.*, effectively serves as a constitution for the Virgin Islands. *Callwood v. Enos*, 230 F.3d 627 (3d Cir. 2000). The Organic Act creates a unicameral legislative body comprised of fifteen senators. 48 U.S.C. § 1571. The executive branch is governed by an elected governor. 48 U.S.C. § 1591.

of the rest of the statute by abrogating it. It is a requirement of § 1401a – that the tax be computed on the "actual value" of the property – that plaintiff contends the Government of the Virgin Islands has violated. Accordingly, while 33 V.I.Code Ann. § 2404 may have abrogated the regulations prescribed by President Roosevelt under § 1401b,[10] the language of § 1401b does not support the proposition asserted by the Government of the Virgin Islands that § 1401a – or its "actual value" requirement – has been abrogated.

c.

That § 1401a's federal requirements apply does not end our inquiry. The Government of the Virgin Islands contends that considerations of federalism support its position that real property taxation is a local matter, and that notwithstanding 48 U.S.C. § 1401a, property tax disputes should be resolved in territorial courts. In other words, the Government of the Virgin Islands contends that federal courts have no jurisdiction over such disputes.

The Government of the Virgin Islands argues that because real property taxation is a matter generally left to the states, courts should be reluctant to find otherwise unless Congress has made an unmistakably clear statement to that effect. *See Pennhurst State Sch. & Hosp. v. Halderman,* 465 U.S. 89, 99, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984). But the "clear statement" rule does not command

[10] The Legislature of the Virgin Islands adopted the same 1.25 percent tax rate specified in § 1401b. 33 V.I.Code Ann. § 2301.

the result sought by the Government of the Virgin Islands. Congress's intent to enter this area of law suffers from no ambiguity. Furthermore, the present case does not fit within the "clear statement" framework. It is indisputable that, in 1936, Congress entered the field of property taxation in the Virgin Islands. The Government of the Virgin Islands's position is that Congress later allowed the Legislature of the Virgin Islands to take over. But it would make little sense to require that Congress make a clear statement that it is *retaining* federal control it indisputably had over this matter. The "clear statement" rule ordinarily applies when Congress seeks to change the relationship between federal and state governments, not when it maintains the status quo.

In any event, principles governing the relations between the states and the federal government are not always applicable to the territories. The principal reason for this is that the Virgin Islands, like all territories, does not share with the states the same sovereign independence. *See Parrott v. Gov't. of the V.I.*, 230 F.3d 615, 623 (3d Cir. 2000) ("[B]oth the Territorial Court and the District Court [of the Virgin Islands] derive their respective jurisdictional grants from the same sovereign – namely, Congress, exercising its authority under Article IV, § 3."); *see also United States v. Wheeler*, 435 U.S. 313, 321, 98 S.Ct. 1079, 55 L.Ed.2d 303 (1978). Thus, the limitations on Congress flowing from the residual sovereignty of the states do not apply where there is no such dual-sovereignty, as when Congress acts under Article IV, section 3, clause 2 of the Constitution.

To be sure, property tax law in the Virgin Islands is, for the most part, "local" law, just as it is in the several states. *See Chase Manhattan Bank, N.A. v. Gov't of the*

V.I., 300 F.3d 320, 323 (3d Cir. 2002) (characterizing property taxes as among several "local taxes" in the Virgin Islands). But its local character derives from Congress. To the limited extent that Congress has entered the field and instituted its own substantive requirements, the local character of property taxation in the Virgin Islands has been altered.

The hybrid character of property taxation in the Virgin Islands may raise questions about the appropriate application of federalism principles in this case even assuming the Virgin Islands were accorded the equivalence of state sovereignty. "[P]rinciples of federalism and comity generally counsel that courts should adopt a hands-off approach with respect to state tax administration." *Nat'l Private Truck Council, Inc. v. Okla. Tax Comm'n,* 515 U.S. 582, 115 S.Ct. 2351, 132 L.Ed.2d 509 (1995). But in this instance, the tax system is not a state tax system, nor is it entirely a territorial tax system. It is partially a federal tax system, and it is not apparent that the federal government should adopt a hands-off approach to the federal aspects of a hybrid federal/territorial system.

Furthermore, while the relative jurisdictions of the territorial and district courts in the Virgin Islands mirror the division of authority between state and Article III district courts, this system derives not from the Constitution, but solely from congressional action. Before 1990, the District Court of the United States Virgin Islands had jurisdiction over most local matters, *Brow v. Farrelly,* 994 F.2d 1027, 1034 (3d Cir. 1993), including property tax disputes, *e.g.*, *Ricardo v. Ambrose,* 110 F.Supp. 716 (D.Vi.1953) (action challenging property tax assessment). In 1984, Congress vested traditional federal jurisdiction – federal question and diversity – in the district court, and

permitted the Government of the Virgin Islands to establish exclusive jurisdiction in the territorial court over local matters. *Id.* at 1033. In 1990, the Virgin Islands legislature divested the district court of jurisdiction over local disputes. *Id.* at 1023. Thus, just as the division of Virgin Islands tax law into federal law and territorial law is subject to Congress's determination, so are the relative jurisdictions of the territorial and the district courts. Congress chose to regulate property taxation in the Virgin Islands and it chose to grant jurisdiction to the district court over actions arising under federal law.

At the same time, we believe Congress intended federal regulation of Virgin Islands taxes to be limited. The system devised by Congress is largely a parallel of state law. Congress was not required to treat the Virgin Islands as though it were sovereign, but in large measure it has chosen to do so. The tax system is, for the most part, a matter of local governance. And the territorial courts, mirroring state courts, have been given primary jurisdiction over local matters. Accordingly, although § 1401a adds a significant federal element to the Virgin Islands tax regime, it remains a local system – created, enforced, and adjudicated locally. While federalism principles do not apply directly as a result of the Virgin Islands' sovereignty, sensitivity to the division between federal and territorial power in this area seems appropriate, given Congress's choice to treat Virgin Islands law – including its taxation regime – with much of the independence of state law. This counsels in favor of eschewing a broad interpretation of the federal rights created by § 1401a that are justiciable in District Court.

This conclusion is supported by the legislative history of § 1401a. In 1936, Congress passed a bill "[t]o establish

an assessed valuation real property tax in the Virgin Islands of the United States" to replace a system viewed as encouraging unproductive use of land. S.Rep. No. 74-1973, at 1 (1936). At that time, taxes were assessed at a certain amount per acre based on the land's use. Uncultivated land was taxed at a low rate, providing an incentive to keep land – even very valuable land – unproductive. *Id.* at 2 (letter of Harold L. Ickes, Secretary of the Interior, to Representative Leo Kocialkowski (May 24, 1935)). It was thought that federal legislation was needed, as the local legislature was unlikely to pass a change to a value-based tax system. S.Rep. No. 74-1973, at 6 (statement of Lawrence W. Cramer, Lieutenant Governor of St. Croix; Robert Herrick, Government Secretary, and George S. Robinson, Government Attorney).

Congress took care to enter this area of law only in a limited way calculated to require a change in the overall system of property taxation to one employing uniform rates tied to actual value, but refraining from instituting permanent particular requirements. It seems apparent, therefore, that the 1936 Act was never intended to change the underlying character of property taxation as primarily subject to local governance.

The Government of the Virgin Islands contends that plaintiff's action is "nothing more than a routine challenge of the alleged excessiveness of their year 2000 property tax assessment." As such, they contend it is a purely local tax question, subject only to territorial court jurisdiction.

Where this is the case, jurisdiction in the District Court is improper. An aggrieved taxpayer does not state a federal claim by objecting that its taxes are not based on the actual "actual value" of its property. If an assessor

arrives at a figure greater than what the taxpayer believes to be the correct number, the assessor has not necessarily violated the requirement that the tax assessment be based on actual value. Only if the assessment *method* does not constitute a reasonable attempt to determine the actual value can a claim be brought under § 1401a. A challenge to the *system* of tax assessments in federal court may be permissible depending on whether it directly implicates federal law; an ordinary challenge to an assessment must be brought in territorial court.

Plaintiff here has adequately alleged a violation under 48 U.S.C. § 1401a. *See Growth Horizons, Inc. v. Delaware County,* 983 F.2d 1277, 1281 (3d Cir. 1993) ("A district court has federal question jurisdiction in any case where a plaintiff with standing makes a non-frivolous allegation that he or she is entitled to relief because the defendant's conduct violated a federal statute."). It contends defendants systematically employed a method of assessment not calculated to determine the actual value of its properties. Because plaintiff's claims "arise under" § 1401a, they are subject to the jurisdiction of the District Court under 48 U.S.C. § 1612 and 28 U.S.C. § 1331.

In this respect, this case is distinguishable from our decision in *Club Comanche, Inc. v. Gov't of the V.I.,* 278 F.3d 250 (3d Cir. 2002). In an action to quiet title, the parties asserted federal jurisdiction because the property boundaries were determined, in part, by federal law. Notwithstanding that federal law may have had an effect on the ultimate resolution of the action, we held it was a territorial law claim because it arose under the Virgin Islands quiet title statute. *Id.* at 259-60. "A suit arises under the law that creates the cause of action." *Am. Well Works Co. v. Layne & Bowler Co.,* 241 U.S. 257, 260, 36

S.Ct. 585, 60 L.Ed. 987 (1916). Plaintiff here claims the government violated § 1401a. It could do so apart from a territorial cause of action to challenge the tax assessments. In this particular case, federal law "creates the cause of action."

d.

In sum, property taxation in the Virgin Islands is governed by a mixture of federal and territorial law. Federal law provides general requirements for real property taxation in the Virgin Islands. Territorial law and its application must be consistent with these federal requirements. Because plaintiff has properly alleged a violation of a federal requirement, it has stated a federal claim in the United States District Court for the District of the Virgin Islands.

Under Article IV, section 3 of the United States Constitution, Congress has the power to regulate taxation in the Virgin Islands. In 1936, it did so. Nothing in that statute, or in any other act of Congress identified by the Government of the Virgin Islands provides a basis to disregard the requirements of that statute.

Because the government has not challenged the District Court's preliminary determination of the merits, we do not address what constitutes "actual value" for these purposes, nor whether the methods employed by defendants represent reasonable means of determining actual value. We also do not address the other requirements for issuance of a preliminary injunction, as defendants have not taken issue with these rulings on appeal.

Accordingly, we will affirm the District Court's preliminary injunction and remand for further proceedings.

208 F.Supp.2d 545

District Court of the Virgin Islands, Division of St. Thomas and St. John.

EQUIVEST ST. THOMAS, INC., Plaintiffs,
v.
GOVERNMENT OF the VIRGIN ISLANDS, and Roy Martin, in his official capacity as Tax Assessor, Defendants.

No. Civ.2001-155.

June 18, 2002.

William S. McConnell, Chad C. Messier, St. Thomas, U.S.V.I., for plaintiff.

Wayne G. Anderson, AAG Nandi Sekou, AAG, Kerry E. Drue, AAG, St. Thomas, U.S.V.I., *Richard M. Prendergast*, AAG, St. Croix, U.S.V.I., for defendant.

MEMORANDUM

MOORE, District Judge.

In the continuing saga of unlawful property tax assessments, Equivest St. Thomas, Inc. ["Equivest" or "plaintiff"] has moved for a preliminary injunction enjoining Roy Martin ["Martin"], the Virgin Islands Tax Assessor, under 42 U.S.C. § 1983 ["1983"], and the government and Martin [collectively "defendants"], under 5 V.I.C. § 80, from assessing and collecting real property taxes on certain commercial property in the Virgin Islands until such taxes and assessments are redetermined based on the "actual value" of each property in accordance with 48 U.S.C. § 1401a and 33 V.I.C. § 2404. Defendants opposed the application and moved to dismiss the case. The Court

heard evidence and argument on June 5, 2002 and took the matter under advisement. I will now deny the defendants' motion to dismiss and will grant plaintiff's application for preliminary injunction in part and deny it in part.

I. FACTUAL BACKGROUND

Equivest[1] is a corporation organized and existing under the laws of the United States Virgin Islands with its principal place of business in St. Thomas, where it owns certain commercial real estate on St. Thomas, commonly known as Bluebeard's Castle ["Bluebeard's"], Bluebeard's Beach Club ["Beach Club"], and the Elysian Resort ["Elysian"]. Each resort has typical hotel amenities, including swimming pools, restaurants, lobbies and tennis courts. Each resort also has timeshare units that plaintiff sells to the general public.

For the year 2000, the Government of the Virgin Islands, through Martin, assessed the total value of these three properties at $98,429,948.00 and sent Equivest a bill for approximately $740,000.00. Equivest contends that the defendants' assessment far exceeds the actual value of these properties. In support of its argument, Equivest offered evidence of a 1999 appraisal of the properties obtained during the sale of the properties from Kosmas Group International, Inc. ["Kosmas"], to plaintiff's predecessors. This appraisal assessed the value of the three properties at $38,250,000.00. Equivest also introduced the

[1] Equivest is the successor by merger to Bluebeard's Castle, Inc. and Castle Acquisitions, Inc. These entities merged to form Equivest, St. Thomas, Inc. on November 1, 2001.

actual sales price of $22,516,502 for the three properties when its predecessors bought them from Kosmas. Finally, plaintiff submitted a third value for the properties of $19,585,152.47, which takes into account the sale of timeshare units since the 1999 purchase.

The complaint alleges and the evidence shows that Martin based his assessment of the value of the three hotel properties on the replacement cost of the properties calculated by multiplying the square footage of the existing structures by $110 per square foot and based the value for the timeshare units on the somewhat arbitrary values stated in the condominium declarations for the respective resorts.[2]

II. DISCUSSION

A. Defendants' Motion to Dismiss

1. Lack of Subject Matter Jurisdiction

Equivest alleges that, by not assessing properties on their "actual value," the defendants are violating a federal statute, which prescribes the method of determining the value of real property upon which the Virgin Islands assesses its local property taxes.[3] In particular, plaintiff

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[2] For instance, Martin separated Bluebeard's Castle timeshare and hotel properties and assessed each property using a different methodology – i.e. replacement cost and declaration value. (Tr. Hr'g on Pl.'s Mot. for Prelim.Inj. at 67-8, June 5, 2002); (*see also id.* at 69-70 (using the same assessment system for the hotel and timeshare properties at the Beach Club and the Elysian).)

[3] Since the subject of this lawsuit is a federal statute and not a local, territorial tax, it is not barred by the State Tax Injunction Act, 28 U.S.C. § 1341 ("The district courts shall not enjoin, suspend, or restrain

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notes that federal law requires the tax assessor to use "actual value" as the basis for computing property tax in the Virgin Islands. *See* 48 V.I.C. § 1401a. The defendants counter that Virgin Islands property taxes are governed solely by 33 V.I.C. § 2404 and, thus, no federal question arises on which this Court can have jurisdiction. As I recently detailed the history of 48 U.S.C. § 1401a and 33 V.I.C. § 2404 in *Berne Corporation v. Government of the Virgin Islands,* 120 F.Supp.2d 528, 531-33 (D.Vi.2000), there is no need to rehash the story here.

What does bear repeating, however, is that section 2404 of title 33 of the Virgin Islands Code

> did not supercede the federal law or remove the local property tax from federal control. The federal requirement under section 1401a that the tax assessor use "actual value" in assessing the tax remains in force and is unaffected by its territorial implementation. The Virgin Islands Legislature merely complied with what the United States Congress required.
>
> The easiest way to understand that 48 U.S.C. § 1401a continues to control the valuation of real property for application of territorial taxes is to examine whether the Virgin Islands Legislature could amend 33 V.I.C. § 2404 to eliminate the requirement that real property taxes "shall be

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the assessment, levy, or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."). *Compare 35 Acres Assocs. v. Adams,* 36 V.I. 270, 274-75, 962 F.Supp. 687, 690 (D.Vi.1997) (holding that stamp tax imposed on privilege of recording deed on the territory's land records is local, non-federal tax covered by State Tax Injunction Act).

> computed on the basis of the actual value of such property." The Virgin Islands derives its legislative authority solely from the Congress, which has extended that power only to those "rightful subjects of legislation not inconsistent with . . . the laws of the United States made applicable to the Virgin Islands." Clearly the territorial lawmakers could not eliminate or vary the "actual value" requirement Congress has imposed.

Berne, 120 F.Supp.2d at 532-33.[4] As Congress has lawfully imposed upon the Virgin Islands under section 1401a the requirement to assess real property according to its actual value and section 1401a is still controlling in this jurisdiction,[5] I find that the plaintiff and its complaint are properly before this Court.[6] Therefore, I will deny

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[4] I agree with the government's reasoning that section 1401b was not meant to continue into perpetuity on account of the language of that section. *See* 48 U.S.C. § 1401b (setting the assessment calculation of Virgin Islands property "[u]ntil local tax laws conforming to the requirements of this Act [48 U.S.C. § 1401-1401e] are in effect"). Thus, the enactment of 33 V.I.C. § 2404 necessitated the abrogation of section 1401b. The government, however, takes its argument one step too far in arguing that 33 V.I.C. § 2404 abrogated section 1401a as well. As is clear from the language of sections 1401a and 1401b and my analysis in *Berne,* only the federal method of calculating the assessment of local property set forth in section 1401(b) ceased to exist upon the enactment of 33 V.I.C. § 2404, not the federal mandate to assess such property using actual value. Thus, the government's abrogation argument is without merit.

[5] The Congress has plenary authority under the Constitution to govern the United States Virgin Islands. *See* U.S. Const. art. IV, § 3, cl. 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States. . . . ").

[6] Relying on my analysis in *Berne,* I also find that Equivest has a valid section 1983 action. *See Berne,* 120 F.Supp.2d at 533- 34 (finding

(Continued on following page)

defendants' motion to dismiss for lack of subject matter jurisdiction.

2. Failure to Exhaust Administrative Remedies

Unlike the plaintiffs in *Berne,* Equivest never filed an appeal with the Virgin Islands Board of Tax Review. The defendants claim that this failure to exhaust its administrative remedies is fatal to Equivest's cause of action. I disagree.

For the doctrine of exhaustion of administrative remedies to apply, an effective remedy through the administrative process is essential. Unfortunately, my brothers on the bench and I have consistently been compelled to conclude that the Board of Tax Review has not provided a remedy to property owners for at least twenty years. *See Anchorage Assoc. v. Virgin Islands Bd. of Tax Review,* 922 F.2d 168, 171 (3d Cir.1990) (noting the Tax Board's "remarkable record of delay and institutional incompetence"); *Berne Corp. v. Government of the Virgin Islands,* Civ. No.2000-141, 2000 WL 1689787, at *1, 2000 U.S.Dist. LEXIS 16683, at *3 (D.Vi. Oct.12, 2000) (noting the Tax Board's "inability and recalcitrance" in following statutory mandates); *Berne,* 120 F.Supp.2d at 535 n. 15 (finding that "the Virgin Islands does not provide a 'plain, speedy, and efficient remedy' to resolve the disputed assessment" despite the Tax Board's mandate under 33 V.I.C. § 2452 to hear appeals within sixty days of filing); *Anchorage Assoc.*

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that section 1401a creates a federally protected right actionable under section 1983).

v. Virgin Islands Bd. of Tax Review, Civ. No.1984/287, 1991 U.S.Dist. LEXIS 20005, at *18 (D.V.I. Feb. 6, 1991) (finding that the Tax Board's excessive delay was a constitutional violation of procedural due process); *Maloney v. Board of Tax Review,* 17 V.I. 326, 328 (D.V.I.1980) (stating that "the Court is cognizant of the Board's failure to comply with the statutory time limits for holding a hearing and rendering a decision on petitioner's appeal."). Since the Tax Board has abdicated its responsibility to provide administrative review of tax appeals, it would be utterly pointless to require plaintiff to appeal its case to the Tax Board before suing in court. Therefore, as I find that no remedy was available, plaintiff properly brought its case straight to court.[7]

B. Plaintiff's Application for Preliminary Injunction

Equivest seeks a preliminary injunction to restrain the government and its tax assessor from illegally

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[7] In addition, it is not entirely clear whether a taxpayer must appeal to the Tax Board before bringing an action in the courts. Section 2451(a) of title 33 of the Virgin Islands Code ["Code"] merely states that "[a]ny person aggrieved by the action of the assessor in relation to the value of his property *may* make written complaint thereof to the Board of Tax Review." 33 V.I.C. § 2451(a) (emphasis added). In the same vein, section 80 of title 5 of the Code provides that "[a] taxpayer may maintain an action to restrain illegal or unauthorized acts by a territorial officer or employee, or the wrongful disbursement of territorial funds." 5 V.I.C. § 80. The inclusion of the word "may" in both statutes suggests that a taxpayer has the discretion to bring its complaint before either tribunal. As the courts of the Virgin Islands are fully operational, while the Tax Board is not, Equivest cannot be faulted for bringing this action for judicial relief.

assessing and collecting property taxes in violation of 48 U.S.C. § 1401a and 33 V.I.C. § 2404. Moreover, the equitable nature of 5 V.I.C. § 80 inherently authorizes injunctive relief. Ordinarily, four factors govern this Court's exercise of its discretion to issue a preliminary injunction: whether movant can establish (1) a reasonable probability of success on the merits, (2) irreparable harm if the relief is denied, and (3) no greater harm to the nonmoving party plus (4) service to the public interest if the relief is granted. *See Berne,* 120 F.Supp.2d at 536; *Joseph v. Henry,* 36 V.I. 115, 121-22, 958 F.Supp. 238, 243 (D.V.I.App.Div.1997). Finding that the plaintiff has met its burden of proof for some of the properties, I will grant its motion in part.

1. Plaintiffs Are Likely to Succeed on the Merits

As previously noted, federal law requires the tax assessor to use "actual value" as the basis for computing property tax in the Virgin Islands. *See* 48 U.S.C. § 1401a. All nine factors contained in 33 V.I.C. § 2404(a)[8] "are to be

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[8] Title 33, Section 2404 of the Virgin Islands Code presently reads:

(a) In computing the *actual value* of real property subject to taxation, the assessor *shall take in consideration* all of the following elements and incidents--

(1) location and surroundings;

(2) quality or fertility;

(3) condition of structures;

(4) recent cost to the present owner;

(5) recent sale price of adjacent property;

(6) recent bona fide offer;

(7) accessibility;

(Continued on following page)

considered" in computing the actual value of property subject to taxation. *See Berne,* 120 F.Supp.2d at 536; *Equity Inv. Corp. v. Government of the Virgin Islands,* 19 V.I. 180, 182 (D.V.I.1982). "Capitalization of income" may be used in conjunction with these nine factors to assess commercial property. *See* 33 V.I.C. § 2404(b).

In the June 5th hearing, Martin testified that his office used replacement cost in assessing the values of the hotel properties for Bluebeard's, Beach Club and the Elysian and used the declaration value in assessing the values of the timeshare units. (Tr. Hr'g on Pl.'s Mot. for Prelim.Inj. at 62-87, June 5, 2002.) Despite his concession that the use of replacement cost does not reflect fair market value and the fact that 48 U.S.C. § 1401a and 33 V.I.C. § 2404 both require use of actual value, Martin

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(8) proximity to public facilities, conveniences and utilities; and

(9) rental or income derived directly from the property. (b) If the property being assessed is commercial property, the assessor may utilize a capitalization of income method of assessment in conjunction with utilization of the factors listed in subsection (a) of this section so long as the utilization of such method results in a greater assessment than if it is not utilized. For purposes of this section, the "capitalization of income method" is a method of assessing commercial property by the conversion of rent to the real property value by the utilization of a capitalization rate applicable to the type of property involved. Determination of the capitalization rate shall be made by the Tax Assessor of the Virgin Islands after careful consideration of the comparable rate used by lending institutions.

(c) The tax assessor may promulgate any rules necessary for the implementation of this chapter.

33 V.I.C. § 2404 (emphasis added.)

reasserted his view that replacement cost is a permissible method of assessing real property in the Virgin Islands. (*Id.* at 71, 76.) Moreover, Martin unconvincingly tried to assert that "replacement cost distills all of the factors [in section 2404]." (*Id.* at 85.) I have already rejected this transparent attempt to fit the assessor's illegal method to the federal requirement; and I reject it again.

> Replacement cost is not equivalent to "actual value," nor is it one of the ten factors listed in section 2404. It is merely the number of square feet multiplied by a replacement cost per square foot. Further, plaintiff['s] evidence that the tax assessor's valuation was several times the properties' appraised value under generally accepted methods would likely persuade a trier of fact that the tax assessor did not use "actual value" in assessing plaintiffs' properties.

Berne, 120 F.Supp.2d at 536. Therefore, I find that Equivest has shown that it would likely succeed on the merits for the hotel properties assessed using replacement cost.

The use of the values stated in the condominium declarations, on the other hand, does not appear to have caused the plaintiff any harm for it seems that the declared value of a timeshare unit is often below its sale price, a difference that would work in plaintiff's favor. Accordingly, I cannot find that the tax bills for the plaintiff's timeshares are based on an illegal method of assessment.

2. Plaintiff Has Established Irreparable Harm

Plaintiff asserts that money damages are inadequate. It will suffer irreparable harm if it is forced to pay its tax bill because it would be forced to close some properties, lay off employees and lose the time-value of money since the government does not pay prejudgment interest. *See* 5 V.I.C. § 426(b). Defendants counter that all the harm Equivest claims it will suffer can be adequately compensated by its legal remedy for monetary damages at a trial on the merits. *See Acierno v. New Castle County,* 40 F.3d 645, 655 (3d Cir.1994) (stating that if the plaintiff "succeeds on the merits of his claim, we believe that economic loss, if it occurs, can be measured in monetary terms and satisfied by a damage award after trial on the merits.").

Under ordinary circumstances, the availability of a tax refund suit would probably negate a claim of irreparable harm. *See Alexander v. "Americans United", Inc.,* 416 U.S. 752, 762, 94 S.Ct. 2053, 40 L.Ed.2d 518 (1974); *Bob Jones University v. Simon,* 416 U.S. 725, 746, 94 S.Ct. 2038, 40 L.Ed.2d 496 (1974). This case, however, does not involve ordinary circumstances. As I have already found here and in *Berne,* the actions of the Tax Assessor's Office in assessing property taxes are transparently unlawful. Therefore, I find that a mere refund suit is not an adequate remedy under these circumstances and conclude that Equivest will suffer irreparable harm unless a preliminary injunction is in place. *See Estate of Michael by Michael v. Lullo,* 173 F.3d 503, 510 (4th Cir.1999).

In the alternative, even if Equivest were unable to establish irreparable harm, I reaffirm my earlier holding that plaintiff need not show irreparable harm, because the very remedy provided by 5 V.I.C. § 80 is equitable in

nature. *See Berne,* 120 F.Supp.2d at 536. Section 80 itself authorizes injunctive relief to restrain or enjoin violations of law. *See id.* The Court of Appeals for the Third Circuit has rejected the rule that plaintiffs must show special pecuniary damages to themselves different in character from the damages suffered by all taxpayers, since

> the Virgin Islands statute imposes no such requirement. Moreover [that] rule . . . seems to us inconsistent with the basic concept of a taxpayer's suit to the extent that it requires a plaintiff to show special personal damage other than the prospect which he shares with other taxpayers. . . .

Smith v. Government of Virgin Islands, 329 F.2d 131, 133 (3d Cir.1964). If no special personal or pecuniary damages are a precondition of injunctive relief, then a showing of non-monetary irreparable harm surely is not needed. *See Berne,* 120 F.Supp.2d at 536.

3. Balance of Harm and Public Interest Favor Plaintiff

The balance of harm and the public interest both favor enjoining the government from assessing property taxes in violation of federal and local law. Indeed, these two factors inherently favor the plaintiffs in a taxpayer suit, since the purpose of section 80 is "to obtain the aid of the district court to restrain any illegal acts of territorial authorities," and it "merely requires a showing that [plaintiffs] are territorial taxpayers." *see Smith,* 329 F.2d at 131, 133. Further, it is undeniable that the public interest weighs in favor of enjoining the government from violating federal law. *See St. John-St. Thomas Hotel & Tourism Ass'n, Inc. v. Government of the Virgin Islands,* 41 V.I. 317, *rev'd on*

other grounds, 218 F.3d 232 (3d Cir.2000) (noting that the public has an interest in the executive branch's compliance with federal law). Moreover, any harm to the defendants will be minimized by an early trial on the merits, which this Court will set for a date in the near future.

C. Unclean Hands

Finally, I am appalled by the unmitigated gall of government counsel to suggest that plaintiff does not come to court with clean hands. (Reply to Pl.'s Opp. to Def.'s Mot. to Dismiss for Lack of Subject Matter Juris. at 9-12.) It is especially galling since I have given the government all the benefit of the doubt in staying these commercial property tax cases[9] that all challenge the same illegal tax assessment system, and giving Martin and his staff time to devise and implement a new tax assessment system pursuant to the government's settlement in *Berne* – a process that will take at least another year to be fully operational. The government nonetheless continues to assess commercial property taxes in the same unlawful manner, refuses to recognize the illegality of its tax bills on these properties, and has not made good faith efforts to resolve the current tax bills pending reassessment and adjustment of taxes once the new assessment system is in place. For example, the government agreed and

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[9] Among the pending cases challenging the tax assessment system are: *Miller Properties, Inc. v. Government,* Civ. No.2001-151; *Schmidt v. Government,* Civ. No.2001-181; *Cyril V. Francois Associates, LLC v. Government,* Civ. No.2001-196; and *Shell Seekers, Inc. v. Government,* Civ. No.2001-197.

stipulated[10] in *Miller Properties v. Government,* Civ. No.2001-151, to issue tax clearance letters to Miller Properties[11] in return for Miller Properties' assurances that it would remain liable for any additional real property taxes to be owed upon reassessment under the new system. Despite this agreement and stipulation, the Commissioner of Finance, Bernice Turnbull, has nevertheless refused to release the necessary documents.[12] Given the

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[10] At the June 5th hearing, the government characterized the agreement and stipulation in *Miller Properties* as something the parties "were working on . . . that [they] hoped, had it worked out, . . . would have [been] used" in this case with Equivest. (Tr. Hr'g on Pl.'s Mot. for Prelim.Inj. at 18, June 5, 2002.) Thus, government counsel gave the Court the distinct impression that they were still negotiating with Miller Properties, but that negotiations had fallen through. Government counsel failed to inform the Court and Equivest that they had actually executed an agreement with Miller Properties on May 24th, a full twelve days before the hearing.

[11] Miller Properties is in the process of selling the Buccaneer Mall and Orange Grove Apartments in St. Croix and needs the tax clearance letters to enable the purchaser to record the deeds for these properties.

[12] At the hearing, government counsel obfuscated Commissioner Turnbull's refusal to issue tax clearance letters by saying that she only refused to issue these letters because section 121 of title 28 of the Virgin Islands Code requires that all property taxes be paid before property can be conveyed. (*Id.* at 19.) Considering that the government's new commercial property consultant, Kenneth Voss, conducted recent appraisals of the Buccaneer Mall and Orange Grove and valued these properties at $4.5 million and $2.1 million, respectively – each well less than the government's assessment on which the tax bills are based of $7.3 million and $5.1 million, respectively – it is clear that Miller Properties has overpaid its property taxes. Since it is unlikely that Miller Properties will owe additional taxes, the Commissioner's refusal to issue the tax clearance letters is even more appalling. Therefore, it is very hard for this Court not to conclude that someone in the executive branch of the Virgin Islands Government is acting in consummate bad faith.

defiance of the Commissioner of Finance and the refusal of the government to recognize here what it has acknowledged elsewhere, it is the government's hands that are dirty.

What has become clear to me is that the government has changed its position. Rather than putting all its efforts into correcting the tax assessment process and negotiating settlements on unlawfully assessed properties, the government now seems to want to litigate these matters. Accordingly, I may have to reconsider my January 31st order staying discovery in the tax assessment cases and let these matters proceed summarily to trial.

IV. CONCLUSION

The enactment of 33 V.I.C. § 2404 does not supersede the federal mandate under section 1401a that the tax assessor use *actual value* as the basis for computing property tax in the Virgin Islands. Therefore, I will deny the defendants' motion to dismiss plaintiff's complaint for lack of subject matter jurisdiction. In addition, I will deny the defendants' motion to dismiss for plaintiff's failure to exhaust its administrative remedies because no viable administrative recourse is presently in place. Finally, I will grant plaintiff's motion for preliminary injunction on the taxes assessed against the plaintiff's hotel properties based on replacement value. The defendants are enjoined from collecting property taxes on the hotel properties in question unless the property or properties are assessed in accordance with 48 U.S.C. § 1401a and 33 V.I.C. § 2404. I will deny the remainder of plaintiff's motion for preliminary injunction because I find that it will not succeed on

the merits. A trial on the merits will be set promptly after consultation of the parties with the magistrate judge.

ORDER

For the reasons set forth in the accompanying memorandum of even date, it is hereby

ORDERED that defendants' motion to dismiss (Docket No. 31) is **DENIED** with prejudice; it is further

ORDERED that plaintiff's motion for preliminary injunction (Docket Nos. 7 and 29) is **GRANTED** in part and **DENIED** in part; the Government of the Virgin Islands and Roy Martin, tax assessor, are enjoined from collecting property taxes against the hotel properties owned by Equivest St. Thomas, Inc. until the tax assessor can establish at a trial on the merits that the property taxes on those properties have been assessed on their actual value in accordance with 48 U.S.C. § 1401a and 33 V.I.C. § 2404; and it is further

ORDERED that a trial on the merits will be set with the date to be announced.

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120 F.Supp.2d 528

District Court of the Virgin Islands,
Division of St. Thomas and St. John

BERNE CORP. and B & B Corp., Plaintiffs,
v.
GOVERNMENT OF THE VIRGIN ISLANDS and
Roy Martin, Tax Assessor, Defendants.

Civ. No. 2000-141.

Sept. 21, 2000.

James M. Derr, St. Thomas, U.S.V.I., for plaintiffs.

Richard M. *Prendergast*, Wayne G. Anderson, Assistant Attorneys General, St. Thomas, U.S.V.I., for defendants.

MEMORANDUM

MOORE, District Judge.

Berne Corporation ["Berne"] and B & B Corporation ["B & B"] [collectively "plaintiffs"] allege that the Government of the Virgin Islands, through its tax assessor, Roy Martin ["Martin" or "tax assessor"], has illegally assessed the value of their commercial properties based on replacement value, rather than the statutorily-required "actual value." Plaintiffs' have filed an application for preliminary injunction seeking to enjoin the tax assessor, under 42 U.S.C. § 1983 ["1983"], and the government and the tax assessor, under 5 V.I.C. § 80, from assessing and collecting property taxes for real property in the Virgin Islands until such taxes and assessments are redetermined based on the "actual value" of each property in accordance with 48 U.S.C. § 1401a and 33 V.I.C. § 2404. Defendants opposed the application and moved to dismiss

the case. The Court heard evidence and argument on August 15, 2000 ["August 15th hearing"] and denied the motion to dismiss. It will now grant the application for preliminary injunction.

I. FACTUAL AND PROCEDURAL BACKGROUND

Berne and B & B Corporation are corporations organized and existing under the laws of the United States Virgin Islands with their principal places of business in St. Thomas, where each owns commercial real estate. Berne is the owner of Parcel Nos. 69, 70BA, and 70A & 71A Kronprindsens Gade, and B & B is the owner of 69A Kronprindsens Gade [collectively the "properties"].

For the year 1999, the Government of the Virgin Islands, through Martin, assessed the value of Berne's parcels at $4,185,690[1] and B & B's at $1,710,230, for a total assessment of $5,895,920, even though the properties sustained considerable damage in Hurricane Marilyn in 1995, and have not been repaired. This assessment is an increase from the pre-Marilyn 1994 assessment of approximately $4.1 million. The complaint alleges and the evidence tends to show that Martin based these values on the replacement cost of the properties, calculated by multiplying the square footage of the existing structures by $110 per square foot, and ignoring damage done by Marilyn, such as the destruction of an entire floor, and structural damage to the lower floor on one property. An

[1] The individual parcels owned by Berne were valued accordingly: Parcel No. 69 ($3,775,580), Parcel 70BA, ($51,867), and Parcel No. 70A & 71A ($358,243).

appraisal attached to the complaint as Exhibit B and dated June 4, 1998, valued the properties at approximately $1.3 million.

In support of their contention that Martin violated federal law by not basing the tax on the actual value of the properties, plaintiffs introduced the testimony of Steven Jamron, a certified general appraiser and real estate broker, who appraised the properties at $745,000 in a report dated August 14, 2000. Mr. Jamron testified that he employed three approaches in his appraisal: a sales comparison approach, which utilizes recent sales of comparable property; a cost approach, which is based on the replacement cost new of the property, minus all forms of depreciation; and a net income approach, which values the property based on its income-production utility. He also testified that the value of the properties never approached 5.5 million dollars for the year 1999 under any generally accepted standard or practice in the appraisal profession.

In support of their contention that they have no adequate redress through local administrative and judicial proceedings, the plaintiffs introduced evidence that they filed a timely appeal of their 1994 assessment in 1995 to the Board of Tax Review ["Board"], which the Board did not hear until January 15, 1999 ["1999 hearing"]. When a revised 1994 tax bill was issued in September of 1999,[2] plaintiffs immediately applied to the Territorial Court for

[2] In September, 1999, plaintiffs received a revised 1994 tax assessment valuing the property at $3,650,000, which amounted to a twelve percent downward adjustment from the original $4,147,845 valuation.

a writ of review of that new bill, which remained unresolved as of the August 15th hearing.

II. THE PLAINTIFFS' CAUSES OF ACTION

The crux of plaintiffs' complaint is that, by not assessing properties on their "actual value," the defendants are violating a federal statute which prescribes the method of determining the value of real property upon which the Virgin Islands assesses its local property taxes.[3] The federal statute underlying this case, 48 U.S.C. §§ 1401-1401e, was enacted by Congress in 1936 to harmonize property taxes in the Territory of the Virgin Islands across different types and uses of land and to reduce the burden of taxation on land in productive use.[4] *See* 48 U.S.C. § 1401 ("It is the policy of Congress to equalize and more equitably to distribute existing taxes . . . and reduce the burden of taxation now imposed on land in productive use. . . . ").

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[3] Since the subject of this lawsuit is a federal statute and not a local, territorial tax, it is not barred by the State Tax Injunction Act, 28 U.S.C. § 1341 ("The district courts shall not enjoin, suspend, or restrain the assessment, levy, or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State"). *Compare 35 Acres Assocs. v. Adams,* 36 V.I. 270, 274-75, 962 F.Supp. 687, 690 (1997) (holding that stamp tax imposed on privilege of recording deed on the territory's land records is local, non-federal tax covered by State Tax Injunction Act).

[4] The Congress has plenary authority under the Constitution to govern the United States Virgin Islands. *See* U.S. CONST. art. IV, § 3, cl. 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States. . . . ").

Section 1401a requires that "all taxes on real property in the Virgin Islands *shall be* computed on the basis of the actual value of such property. . . . "[5] *Id.* (emphasis added). Section 1401b gave the two Virgin Islands municipal legislative authorities three months to enact laws enforcing the provisions of 1401a, failing which the President would prescribe interim regulations.[6] When St. Thomas/St. John did not follow the Municipality of St. Croix in enacting the required provisions,[7] President Roosevelt

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[5] The full text of 48 U.S.C. § 1401a reads:

> For the calendar year 1936 and for all succeeding years all taxes on real property in the Virgin Islands shall be computed on the basis of the actual value of such property and the rate in each municipality of such islands shall be the same for all real property subject to taxation in such municipality whether or not such property is in cultivation and regardless of the use to which such property is put.

[6] The full text of 48 U.S.C. § 1401b reads:

> Until local tax laws conforming to the requirements of sections 1401 to 1401e of this title are in effect in a municipality the tax on real property in such municipality for any calendar year shall be at the rate of 1.25 per centum of the assessed value. If the legislative authority of a municipality failed to enact laws for the levy, assessment, collection, or enforcement of any tax imposed under authority of said sections, within three months after May 26, 1936, the President shall prescribe regulations for the levy, assessment, collection, and enforcement of such tax, which shall be in effect until the legislative authority of such municipality shall make regulations for such purposes.

[7] Pursuant to its Article IV authority to govern the Territory of the Virgin Islands, Congress on June 22, 1936, enacted the Organic Act of 1936, which continued the Municipality of St. Croix and the Municipality of St. Thomas and St. John as separate bodies politic. *See* Act of June 22, 1936, ch. 699, §§ 2, 40, 49 Stat. 1807, *reprinted in* V.I.CODE ANN., Historical Documents, 45-83 (1967) ["1936 Organic Act"]. On September 5, 1936, the Council of the Municipality of St. Croix enacted

(Continued on following page)

prescribed regulations for the levy, assessment, collection, and enforcement of real property taxes for the Municipality of St. Thomas and St. John. These remained in force until 1955, when the First Legislature organized under the Revised Organic Act of 1954[8] made the presidentially prescribed regulations applicable throughout the Virgin Islands.

Among the provisions adopted by the First Legislature was 33 V.I.C. § 2404, which, as amended, prescribes all of the factors that the assessor must evaluate in computing the "actual value" of real property subject to taxation.[9]

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a property tax law in conformity with section 1401a. See *Ricardo v. Ambrose,* 3 V.I. 482, 489, 211 F.2d 212, 215-17 (3d Cir.1954) (giving a brief history of property taxes in the Virgin Islands).

[8] Acting again under its Article IV authority, the Congress enacted the Revised Organic Act of 1954, 48 U.S.C. §§ 1541-1645 (1995 and Supp.2000), *reprinted in* V.I.CODE ANN., Historical Documents, 73-177 (codified as amended) (1995 and Supp.2000) ["Revised Organic Act"]. In section 5(a), Congress supplanted the two municipal councils with a single, unicameral "Legislature of the Virgin Islands." *See* REV.ORG.ACT § 5(a), 48 U.S.C. § 1571(a).

[9] Title 33, Section 2404 of the Virgin Islands Code presently reads:

> (a) In computing the *actual value* of real property subject to taxation, the assessor *shall take in consideration* all of the following elements and incidents –
>
> (1) location and surroundings;
>
> (2) quality or fertility;
>
> (3) condition of structures;
>
> (4) recent cost to the present owner;
>
> (5) recent sale price of adjacent property;
>
> (6) recent bona fide offer;
>
> (7) accessibility;
>
> (8) proximity to public facilities, conveniences and utilities; and

(Continued on following page)

This local enactment did not supersede the federal law or remove the local property tax from federal control. The federal requirement under section 1401a that the tax assessor use "actual value" in assessing the tax remains in force and is unaffected by its territorial implementation. The Virgin Islands Legislature merely complied with what the United States Congress required.

The easiest way to understand that 48 U.S.C. § 1401a continues to control the valuation of real property for application of territorial taxes is to examine whether the Virgin Islands Legislature could amend 33 V.I.C. § 2404 to eliminate the requirement that real property taxes "shall be computed on the basis of the actual value of such property." The Virgin Islands derives its legislative authority solely from the Congress, which has extended that power only to those "rightful subjects of legislation not inconsistent with . . . the laws of the United States made

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(9) rental or income derived directly from the property.

(b) If the property being assessed is commercial property, the assessor may utilize a capitalization of income method of assessment in conjunction with utilization of the factors listed in subsection (a) of this section so long as the utilization of such method results in a greater assessment than if it is not utilized. For purposes of this section, the "capitalization of income method" is a method of assessing commercial property by the conversion of rent to the real property value by the utilization of a capitalization rate applicable to the type of property involved. Determination of the capitalization rate shall be made by the Tax Assessor of the Virgin Islands after careful consideration of the comparable rate used by lending institutions.

(c) The tax assessor may promulgate any rules necessary for the implementation of this chapter.

(Emphasis added.)

applicable to the Virgin Islands."[10] Clearly the territorial lawmakers could not eliminate or vary the "actual value" requirement Congress has imposed.

A. Section 1983, Title 42 of the United States Code, Permits Suit for Prospective Relief Against the Tax Assessor in His Official Capacity.

Plaintiffs' cause of action under 42 U.S.C. § 1983 is against Martin in his official capacity to enjoin him from depriving plaintiffs of a right secured by the laws of the United States, to wit, the right to have their real property taxed at its actual value under 48 U.S.C. § 1401a. Because plaintiffs seek only prospective relief from Martin, and the federal statute at issue creates a specific, binding obligation on the tax assessor that inures to plaintiffs' benefit, Berne and B & B have a valid section 1983 cause of action.

1. *Liability of Local Officials Under Section 1983*

Section 1 of the Civil Rights Act of 1871, 42 U.S.C. § 1983, renders certain "persons" liable for deprivations of constitutional or federal statutory rights.[11] A state or

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[10] Section 8(a) of the Revised Organic Act, 48 U.S.C. § 1574(a) provides for the legislative power of the Territory: "The legislative authority and power of the Virgin Islands shall extend to all rightful subjects of legislation not inconsistent with this Act or the laws of the United States made applicable to the Virgin Islands. . . ."

[11] Section 1983 states in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any . . . Territory . . . ,

(Continued on following page)

territorial official acting in his official capacity is a "person" under section 1983 when only injunctive relief is sought. *See Will v. Michigan Dep't of State Police,* 491 U.S. 58, 71 n. 10, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989) ("Of course a state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because 'official-capacity actions for prospective relief are not treated as actions against the State.'") (quoting *Kentucky v. Graham,* 473 U.S. 159, 167, n. 14, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985)); *Ngiraingas v. Sanchez,* 495 U.S. 182, 110 S.Ct. 1737, 109 L.Ed.2d 163 (1990) (territorial officials are state officials under section 1983). [12]

Plaintiffs seek to restrain Martin only from collecting illegal property taxes assessed or imposed in violation of the federal statute. For purposes of this prospective injunctive relief, Martin is considered a "person" under section 1983 and he acts under color of law when he assesses and collects property taxes. *See Kentucky v. Graham,* 473 U.S. at 166, 105 S.Ct. 3099 ("it is enough to show that the official, acting under color of law, cause[s] the deprivation of a federal right."). Plaintiffs, therefore,

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subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the . . . laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

[12] This Court, sitting in its appellate capacity, has observed that section 1983 does not permit suits against territorial officials acting in their official capacities when money damages are sought. *See Nibbs v. Roberts,* 31 V.I. 196, 206, 1995 WL 78295, *4-*5 (App.Div.1995) (citing *Ngiraingas v. Sanchez,* 495 U.S. 182, 110 S.Ct. 1737, 109 L.Ed.2d 163 (1990)).

may maintain this 1983 injunctive action against Martin in his official capacity as tax assessor.

2. *Section 1401a Creates a Federally Protected Right Actionable Under Section 1983.*

The Court next must determine whether there has been a "deprivation of any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983; *see also Nibbs,* 31 V.I. at 213-14, 1995 WL 78295, at *8. Plaintiffs complain that the tax assessor has violated and routinely violates the requirements of 48 U.S.C. § 1401a that property be assessed at its federally mandated actual value.

While the mere existence of a federal law does not by itself support a cause of action to prevent or remedy its violation, the Supreme Court has recognized that "the § 1983 remedy broadly encompasses violations of federal statutory as well as constitutional law." *Maine v. Thiboutot,* 448 U.S. 1, 4, 100 S.Ct. 2502, 65 L.Ed.2d 555 (1980).[13] The Supreme Court has narrowed the effect of *Thiboutot* by excluding statutes that contain "comprehensive enforcement mechanisms" that demonstrate "congressional intent to preclude the remedy of suits under § 1983." *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n,* 453 U.S. 1, 20, 101 S.Ct. 2615, 69 L.Ed.2d 435 (1981); *see also Wright v. City of Roanoke Redev. and Hous.*

[13] *See also Monell v. Dept. of Soc. Serv. of City of N.Y.,* 436 U.S. 658, 700-01, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978) ("there can be no doubt that [section 1983] was intended to provide a remedy, to be broadly construed, against all forms of official violation of federally protected rights.").

Auth., 479 U.S. 418, 107 S.Ct. 766, 93 L.Ed.2d 781 (1987) (administrative enforcement mechanism without judicial remedies is not sufficiently comprehensive). The Court stated further that the statute in question must not merely declare policy; it must create enforceable rights. *See Pennhurst State School and Hosp. v. Halderman,* 451 U.S. 1, 19, 101 S.Ct. 1531, 67 L.Ed.2d 694 (1981) (Section 1983 "rights, privileges, or immunities" exclude federal provisions that do "no more than express a congressional preference for certain kinds of treatment").

The Supreme Court summarized and supplemented these exceptions by articulating a three-part test to determine whether a statute creates enforceable rights. *See Golden State Transit Corp. v. City of Los Angeles,* 493 U.S. 103, 110 S.Ct. 444, 107 L.Ed.2d 420 (1989). First, the Court cited *Pennhurst* as requiring that the federal statute in question create an obligation binding on a government unit. Second, relying on *Wright,* the Court held that the plaintiff's interests must be sufficiently specific to be judicially enforceable. Third, the Court required that the federal provision in question be intended to benefit the plaintiff. Once the plaintiff has shown that the statutory provision at issue meets these three requirements, the defendant still may defeat the action by showing that Congress foreclosed a remedy under section 1983 by enacting an alternative comprehensive enforcement mechanism. *See id* at 106, 110 S.Ct. 444.

The federal provision at issue here, 48 U.S.C. § 1401a, employs the word "shall," and is mandatory. *See Rental Equip. Co., Inc. v. Meridian Eng'g Co., Inc.,* 10 V.I 421, 429-30, 374 F.Supp. 892, 898 (1974) (word "shall" normally implies mandatory action). Section 1401a creates a binding obligation on the Virgin Islands to assess property

taxes using the "actual value" of the real property. The first *Golden State* requirement is therefore satisfied.

Further, section 1401a creates an interest, the use of "actual value" for computation of property taxes, which is sufficiently specific to be judicially enforceable. In a case after *Golden State,* the Supreme Court held that an amendment requiring that reimbursement by states to healthcare providers under the Medicaid Act be "reasonable and adequate" created a binding obligation that was specific enough for judicial enforcement. *See Wilder v. Virginia Hosp. Ass'n,* 496 U.S. 498, 110 S.Ct. 2510, 110 L.Ed.2d 455 (1990). "Actual value" is equated with "fair market value" or the "amount at which property would change hands between a willing buyer and a willing seller." *See* BLACK'S LAW DICTIONARY at 35, 597 (6th ed.1991). The term "actual value," being even more specific than the words "reasonable" and "adequate," is surely sufficiently specific to warrant judicial enforcement, and meets the second *Golden State* prong.

Finally, section 1401a clearly was intended to benefit taxpayers by creating uniformity of taxation and reducing the burdens of taxation on land (and thus landowners such as plaintiffs) in productive use. *See* 48 U.S.C. § 1401 ("It is the policy of Congress to equalize and more equitably to distribute existing taxes on real property in the Virgin Islands of the United States and to reduce the burden of taxation now imposed on land in productive use in such islands."). The three requirements of *Golden State* having been satisfied, and the defendant having failed to allege or show a comprehensive enforcement scheme indicative of Congress' intent to preclude suit under section 1983 (and there being none), the Court concludes that 48 U.S.C.

§ 1401a creates a federally protected right actionable pursuant to 42 U.S.C. § 1983.

B. Section 80 of Title 5, Virgin Islands Code, Authorizes Suit on Behalf of Property Taxpayers.

The Court has supplemental jurisdiction over plaintiffs' claim under 5 V.I.C. § 80, which states that "[a] taxpayer may maintain an action to restrain illegal or unauthorized acts by a territorial officer or employee, or the wrongful disbursement of territorial funds."[14] The Editor's note to this section states that it

> is designed to clarify the right of a taxpayer to bring an action to restrain unlawful action by a territorial officer or employee. Similar provisions appear in the laws of a majority of the states. The section is believed to be declaratory of existing law.

Nothing limits the application of this statute to disbursements of funds, as the defendants have argued. The plain language of section 80 applies to intentional acts of assessing and collecting taxes that are illegal or unauthorized. There is no dispute that plaintiffs have standing as taxpayers to maintain an action to restrain the allegedly unauthorized actions of the tax assessor. *See*

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[14] The Court exercises supplemental jurisdiction over issues of Virgin Islands law pursuant to 28 U.S.C. § 1367(a) (district courts having original jurisdiction "shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy. . . . ").

Holmes v. Government of Virgin Islands, 10 V.I. 365, 369, 370 F.Supp. 715, 717 (1974) (taxpayers in Virgin Islands may maintain suit in district court against illegal government action).[15]

As appropriate, a plaintiff may bring suit under section 80 on behalf of all similarly situated taxpayers. *See Smith v. Government of Virgin Islands*, 4 V.I. 489, 493, 329 F.2d 131, 133 (3d Cir.1964) ("If there has been a violation or evasion of the law . . . , damage is presumed to result to all taxpayers. The object of the suit is to prevent the violations of the law.") (quoting *Lucas v. American-Hawaiian Engineering & Const. Co.*, 16 Haw. 80, 86-87 (1904)). The government has offered no good reason why the same principles do not apply to restrain an evasion of the statutes requiring property taxes to be based on actual value. The violation of law alleged by plaintiffs is presumed to harm all payers of the property taxes whose properties have also been illegally valued.

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[15] Plaintiffs' lawsuit also is not barred by the State Tax Injunction Act, 28 U.S.C. § 1341, because the Virgin Islands does not provide a "plain, speedy and efficient remedy" to resolve the disputed assessment. Even though 33 V.I.C. § 2452 requires the Board of Tax Review to hear an appeal within sixty days of its filing, it took four years for the plaintiffs to obtain an inadequate hearing on their 1994 appeal, and another year has passed with no indication that the matter will soon be decided by the Territorial Court. Plaintiffs were prevented from cross-examining the tax assessor about the method he used to calculate the assessment. The acting chairman did not "want to get into an attorney thing" and did not "want to get into that litigation thing." (*See* Tr.Bd. of Tax Review Hr'g at 57-58, Jan. 15, 1999; Pls.' Ex. 2.) This amounted to a denial of procedural due process. The inadequacy of plaintiffs' territorial remedy is confirmed by the additional year plaintiffs' petition for writ of review has been pending in the Territorial Court.

III. PLAINTIFFS' APPLICATION FOR PRELIMINARY INJUNCTION

Berne and B & B seek a preliminary injunction to restrain the government and its tax assessor from improperly assessing and collecting property taxes in violation of 48 U.S.C. § 1401a and 33 V.I.C. § 2404, and the very language of 5 V.I.C. § 80 authorizes injunctive relief. Ordinarily, four factors govern this Court's exercise of its discretion to issue a preliminary injunction: whether movant can establish (1) a reasonable probability of success on the merits, (2) irreparable harm if the relief is denied, and (3) no greater harm to the nonmoving party plus (4) service to the public interest if the relief is granted. *See Joseph v. Henry,* 36 V.I. 115, 121-22, 958 F.Supp. 238, 243 (App.Div.1997). Because the plaintiffs are not required to show irreparable harm under 5 V.I.C. § 80, and the other three preliminary injunction factors favor the plaintiffs, the Court will grant the motion.

1. *Plaintiffs Are Likely to Succeed on the Merits.*

As previously noted, federal law requires the tax assessor to use "actual value" as the basis for computing property tax in the Virgin Islands. *See* 48 V.I.C. § 1401a. All nine factors contained in 33 V.I.C. § 2404(a) "are to be considered" in computing the actual value of property subject to taxation. *See Equity Inv. Corp. v. Government of the Virgin Islands,* 19 V.I. 180, 182 (D.V.I.1982). "Capitalization of income" may be used in conjunction with these nine factors to assess commercial property. *See* 33 V.I.C. § 2404(b).

Mr. Martin admitted that his office used the replacement cost of the buildings in arriving at his assessed value

of the properties. (*See* Tr.Bd. of Tax Review Hr'g at 51, Jan. 15, 1999; Pls.' Ex. 2.) Replacement cost is not equivalent to "actual value," nor is it one of the ten factors listed in section 2404. It is merely the number of square feet multiplied by a replacement cost per square foot. Further, plaintiffs' evidence that the tax assessor's valuation was several times the properties' appraised value under generally accepted methods would likely persuade a trier of fact that the tax assessor did not use "actual value" in assessing plaintiffs' properties. Plaintiffs have shown that they are likely to succeed on the merits.

2. *No Irreparable Harm Need Be Shown.*

The plaintiffs need not show irreparable harm because the very remedy provided by 5 V.I.C. § 80 is equitable in nature. Section 80 itself authorizes injunctive relief to restrain or enjoin violations of law. The Court of Appeals for the Third Circuit has rejected the rule that plaintiffs must show special pecuniary damages to themselves different in character from the damages suffered by all taxpayers, since

> the Virgin Islands statute imposes no such requirement. Moreover [that] rule . . . seems to us inconsistent with the basic concept of a taxpayer's suit to the extent that it requires a plaintiff to show special personal damage other than the prospect which he shares with other taxpayers. . . .

Smith at 494, 329 F.2d at 133. If no special personal or pecuniary damages are a precondition of injunctive relief,

then a showing of non-monetary irreparable harm surely is not needed.[16]

3. *Balance of Harm and Public Interest Favor Plaintiffs.*

The balance of harm and the public interest both favor enjoining the government from assessing property taxes in violation of federal and local law, as the government appears to concede by not briefing or arguing either of these two factors. Moreover, any harm to the defendants is minimized by the expedited trial of this matter. Indeed, these two factors inherently favor the plaintiffs in a taxpayer suit, since its purpose is "to obtain the aid of the district court to restrain any illegal acts of territorial authorities," *see id.* at 492, 329 F.2d at 131, and it "merely requires a showing that [plaintiffs] are territorial taxpayers," *see id.* at 494, 329 F.2d at 133. Further, it is undeniable that the public interest weighs in favor of enjoining the government from violating federal law. *See St. Thomas-St.John Hotel & Tourism Ass'n, Inc. v. Government of U.S. Virgin Islands,* 1999 WL 376873, *11, 1999 U.S. Dist. LEXIS 8652 (D.Vi.1999), *rev'd on other grounds,* 218 F.3d

[16] Defendants rely on an opinion of this Court for the proposition that the Court will not enjoin tax collections unless there is irreparable injury. *See Ricardo v. Ambrose,* 2 V.I. 266, 110 F.Supp. 716 (1953), *aff'd,* 3 V.I. 482, 211 F.2d 212 (3d Cir.1954). The Court stated that "the collection of a tax will not be enjoined on account of defects, mistakes, irregularities or omissions of statutory requirements . . . which are not of such a nature as to affect the substantial justice of the tax itself or work irreparable injury. . . . " *Id.* at 279, 110 F.Supp. at 722. Since plaintiffs' case challenges the substantial justice of a property tax based on an unauthorized assessment, *Ambrose* is entirely inapposite.

232 (3d Cir.2000) (public has interest in executive branch not violating federal law). To minimize any harm to the government, the Court will set a prompt trial on the merits.

IV. CONCLUSION

The Court denied the defendants' motion to dismiss at the close of the August 15th hearing. It will now grant plaintiffs' motion for a preliminary injunction. The defendants are enjoined from collecting property taxes unless the property or properties were assessed in accordance with 48 U.S.C. § 1401a and 33 V.I.C. § 2404. A trial on the merits is set for the week of December 4, 2000.

ORDER

For the reasons set forth in the accompanying memorandum of even date, it is hereby

ORDERED that defendants' motion to dismiss is **DENIED WITH PREJUDICE**; it is further

ORDERED that plaintiffs' application for preliminary injunction is **GRANTED**; the Government of the Virgin Islands and Roy Martin, tax assessor, are enjoined from collecting property taxes against the real property owned by Berne Corporation and B & B Corporation until the tax assessor can establish at a trial on the merits that the property taxes on those properties have been assessed on their actual value in accordance with 48 U.S.C. § 1401a and 33 V.I.C. § 2404; it is further

ORDERED that a ruling on whether this action shall be expanded to include all the taxpayers similarly situated

under 5 V.I.C. § 80 shall await further proceedings; and, it is further

ORDERED that a trial on the merits is scheduled for December 4, 2000 at the District Court on St. Thomas.

2003 WL 21078073

District Court of the Virgin Islands,
Division of St. Thomas and St. John.

BERNE CORP. and B & B Corp., Twenty-one Queens Quarter, Inc., Miller Properties, Inc., Equivest St. Thomas, Inc., Robert Schmidt, Kim Holdsworth, Robert Schmidt Development Corp., and Dori P. Derr, The Cyril V. Francois Associates, LLC, Shell Seekers, Inc., Charles W. Consolvo, Linda B. Consolvo, Snegle Gade Associates LP, Charles W. Consolvo as Trustee of the Yvette B. Lederberg Trust, Arthur B. Choate, Stewart Loveland, and Stacy Loveland, Elisabeth Sharp, Lindon Corp., Gordon L. Coffelt, Soraya Diase Coffelt, and One Stop, Inc., Plaintiffs,

v.

GOVERNMENT OF THE VIRGIN ISLANDS, Roy Martin, in his official capacity as Tax Assessor, and the Board of Tax Review, Defendants.

No. CIV.2000-141, CIV.2000-167, CIV.2001-151, CIV.2001-155, CIV.2001-181, CIV.2001-196, CIV.2001-197, CIV.2001-228, CIV.2002-057.

May 12, 2003.

James M. Derr, Esq., St. Thomas, for plaintiffs Berne Corp. and B & B Corp., Miller Properties, Schmidt et al.

David A. Bornn, Esq., Rochelle Bermudez, Esq., St. Thomas, for plaintiffs Twenty-one Queens Quarter, Inc, Cyril V. Francois Associates.

Chad C. Messier, Esq., *William S. McConnell*, Esq., St. Thomas, for plaintiff Equivest St. Thomas, Inc.

David E. Nichols, Esq., St. Thomas, for plaintiffs Shell Seekers.

Soraya Diase-Coffelt, Esq., St. Thomas, for plaintiffs Lindon Corp. et al.

Kerry E. Drue, AAG, Esq., *Wayne G. Anderson*, AAG, Esq., Carol Thomas-Jacobs, AAG, Esq., St. Thomas, *Michael McLaurin*, AAG, Esq., St. Croix, for the defendants.

PROPERTY TAX LITIGATION CONSOLIDATED TRIAL ON COMMON ISSUES

MOORE, J.

MEMORANDUM

I. SYNOPSIS

Although the Virgin Islands is a non-self-governing territory of the United States, one of the areas of autonomy Congress has granted these Islands is the taxation of real property. All Congress requires is that the Territory design and implement a real property tax system based on the property's actual value. Unfortunately, the statutory framework for taxing real estate enacted by the Virgin Islands Legislature and the administration of this system by the Virgin Islands Tax Assessor and Board of Tax Review violates that federal mandate. The present Governor, his Attorney General, and the Tax Assessor, have known they are violating federal law since the Fall of 2000 when I granted the first plaintiffs' motion for a preliminary injunction. The Attorney General acknowledged as

much in settling that case and agreeing to overhaul the process to insure that within two years all property would be assessed at its actual value. For whatever reason, the Governor decided to bypass that agreement and to relitigate the issue in these later-filed cases. Not only has the Attorney General thereafter been defending the indefensible in this Court, but also, during the very trial of these common issues, he mislead [sic] the Legislature into passing an amendment that obstructs the processes of this Court and perpetuates the illegal collection of property taxes without allowing for retroactive credits once the system complies with federal law.

In addition to the Executive Branch, the Legislature has also miserably failed the people of the Virgin Islands by not living up to its responsibility to determine how much revenue property taxes should contribute to the overall budget of the Virgin Islands Government. The best evidence of this shirking of legislative responsibility is the Legislature's failure to change the tax rate of 1.25 percent since it was set by Congress in 1936 – almost seventy years ago. This failure to adjust the property tax rate to accommodate changes in the Government's budget puts undue and unnecessary pressure on the Tax Assessor's levels of assessment, which I believe has affected the integrity of the property tax system and has contributed to its failure to provide reliable and credible assessments. The Legislature has further contributed to the illegality of the property tax system by enacting provisions over the years that prevent the Tax Assessor from appraising commercial and residential property at actual value.

I accordingly will enter a decree enjoining the Tax Assessor from appraising and assessing any real property in the Virgin Islands *until* he has upgraded the system of

appraisal and assessment to comply with federal law by assessing each property on its actual value. I will also enjoin the Government of the Virgin Islands from requiring payment of real property tax bills for the 1999 tax year and later years *until* the Tax Assessor is capable of reliably and credibly appraising and assessing all real property at its actual value *and* the Board of Tax Review consistently holds timely hearings and reaches timely decisions on all property tax appeals *and* the Department of Finance consistently remits any refunds resulting from Board's decision within the time prescribed by law.

II. INTRODUCTION

With the very first lawsuit of this consolidated civil rights litigation against the Government of the Virgin Islands and its Tax Assessor, it became clear that the system for assessing and taxing real property in the Virgin Islands is broken and does not implement the federal statutory requirement that all real property must be assessed at its actual value. The Government explicitly recognized this in its settlement of the *Berne* Case in December of 2000 by agreeing to bring the Tax Assessor's assessment procedures and processes into compliance with the uniform national appraisal standards, and to appoint an independent special master to review for compliance.

Unfortunately, but all too typically, rather than committing the necessary resources to fix its failed property tax system, the Government chose to ignore the *Berne* Settlement and relitigate the same issues in these other cases, elected to challenge this Court's federal question jurisdiction, failed to negotiate or conduct discovery in good faith, and, ultimately, decided to defend the indefensible at trial. The Government has lost on all counts: the

Court of Appeals for the Third Circuit upheld this Court's jurisdiction and this Court is about to enjoin permanently the collection of property tax bills based on assessments made in violation of federal law, beginning with tax year 1999. But it is the people of the Virgin Islands who have truly lost by the Turnbull Administration's conduct of this litigation, for the real property assessment system still does not fairly or equitably tax their real property at its actual, fair market value.

On February 6, 2003, while this litigation was in progress and during the trial of the common facts and issues, the Governor of the Virgin Islands, Charles W. Turnbull, on the advice of his Attorney General, Iver Stridiron, sent to the Legislature and prompted those solons to enact a law that directly contradicts pre-existing orders of this Court and thus seriously obstructs the processes of this Court. In the face of this Court's valid and still binding ruling in *Berne* that the 1999 commercial property tax bills are based on an assessment process that violates federal law, the Attorney General misled Governor Turnbull into making certain representations in a letter dated February 2, 2003, to the President of the Legislature, Senator David Jones. The Governor wrote that

> [t]he Attorney General has stated, however, that it is his opinion that if the law is changed, there would be no violation of the current Settlement Agreement. It is his opinion that the Government would still be able to continue with the process of sending out corrected commercial real property tax bills until such time as new appraisal guidelines are implemented.

(Letter from Governor Charles W. Turnbull to Senator David S. Jones of Feb. 5, 2003, at 2.) The Legislature later

enacted, and the Governor signed into law, a provision that would use these illegal commercial property assessments for 1999 as "the basis of computing commercial property taxes for the tax years 2001, 2002, 2003, and 2004." Act of Feb. 27, 2003, No. 6574 (amending 33 V.I.C. § 2402(b)). Attorney General Stridiron did not even attempt to save the validity of the Act by recommending that it allow for credits to those commercial property taxpayers whose 1999 bills turn out to be excessive once their properties are reappraised and assessed at their actual values by a fair and equitable system. The net result of the amendment is that the Turnbull Administration and the Legislature would require Virgin Islands commercial property owners to pay four more years of property taxes that have been assessed in violation of federal law.

III. GENERAL BACKGROUND

This is not the first time that special interests and the recalcitrance of local Virgin Islands officials have required federal intervention to correct the Territory's system for assessing and collecting real property taxes. The first time was almost seventy years ago, while drafts of the 1936 Organic Act were pending. The Congress of the United States exercised its legislative authority over this unincorporated territory to address an urgent problem with the assessment of real property taxes that "had been the target of criticism by all competent observers since the Virgin Islands came under the American flag" in 1917. (Ex. J-1, Letter of Harold Ickes, Secretary of Interior Apr. 23, 1935.) According to the committee of local government officials appointed by the Governor, "there is little probability that an equitable assessed valuation property tax could be got through the local" municipal councils because

they were "largely made up of large property owners." For this reason it was necessary for the Congress to act, while at the same time giving the local municipal legislatures as much latitude as possible by making the "Federal tax operative only in the absence of local legislation conforming to the Federal requirements." The rate of 1.25 percent was suggested by these local officials. (*Id.* Justification attached to Sen. Report 1973.) Accordingly, on **May 26, 1936**, it was declared to be "the policy of Congress to equalize and more equitably to distribute existing taxes on real property in the Virgin Islands of the United States and to reduce the burden of taxation now imposed on land in productive use in such islands." 48 U.S.C. § 1401.

Congress accomplished this harmonization by imposing an *ad valorem* property tax system that required real property to be taxed at 1.25 percent of its actual value. *See* 48 U.S.C. § 1401a ("For the calendar year 1936 and for all succeeding years all taxes on real property in the Virgin Islands shall be computed on the basis of the actual value of such property. . . . "); *id.* § 1401b ("Until local tax laws conforming to the requirements of sections 1401 to 1401e of this title are in effect in a municipality the tax on real property in such municipality for any calendar year shall be at the rate of 1.25 per centum of the assessed value.").[1]

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[1] Section 1401b continued by allowing for local legislation to implement the federally imposed value-based tax:

> If the legislative authority of a municipality shall fail to enact laws for the levy, assessment, collection, or enforcement of any tax imposed under authority of this Act [48 USCS §§ 1401-1401e] within three months after the date of its enactment [May 26, 1936], the President shall prescribe regulations for the levy, assessment, collection, and enforcement

(Continued on following page)

The federal tax rate of 1.25 percent has never been changed and presently is codified at 33 V.I.C. § 2301. The Virgin Islands statute that originally implemented this federal *ad valorem* property tax set forth nine factors the assessor shall consider in computing the actual value of real property subject to taxation. *See* 33 V.I.C. § 2404(a). In 1985, the Virgin Islands Legislature added a provision that would allow the Tax Assessor to use a "capitalization of income method of assessment" for commercial property, but only if it "results in a greater assessment than if it is not utilized." *See id.* § 2404(b). Then, in 1988 the Legislature amended section 2402 to prohibit the Tax Assessor from "increas[ing] the valuation and assessment of non-commercial property more than 10% over the previous valuation and assessment except [in cases where improvements have been made to the subject property subsequent to the previous valuation and assessment or where the subject property was sold after the previous valuation and assessment]." *See id.* § 2402(a).

Plaintiffs are taxpaying owners of real property in the Virgin Islands who brought these consolidated civil rights

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of such tax, which shall be in effect until the legislative authority of such municipality shall make regulations for such purposes.

The municipal council for St. Croix promulgated its own regulations right away, but President Franklin D. Roosevelt's regulations governed St. Thomas until 1955. *See* 33 V.I.C. § 2404, Revision note, at 320 ("Based on section 5, Regulations of the President of the United States for the Levy, Assessment, Collection and Enforcement of an Assessed Valuation of Real Property Tax, at the Rate of One and One-Quarter Percent, in the Municipality of St. Thomas and St. John, Virgin Islands of the United States, prescribed December 31, 1936, as enacted into law for the entire Virgin Islands by Act March 31, 1955, No. 24, § 17.").

actions against the Government of the Virgin Islands and its Tax Assessor to vindicate plaintiffs' federal statutory right to have their property appraised, assessed, and taxed based on its actual value. Plaintiffs cover the complete spectrum of all real property taxpayers in that they are owners of real property in the Districts of St. Thomas/St. John and St. Croix who complain about the method of assessing real property taxes on vacant land, agricultural land, commercial properties, residential properties, condominiums, and timeshare units. The parties tried their cases to the Court for seven days in January 2003 and I am now prepared to render my rulings on the issues of fact and law that are common to all.[2] I first recap the tortured procedural history of this litigation and recite this Court's federal and local jurisdiction over these complaints and the remedies available to the Court over the Virgin Islands property tax system.

IV. PROCEDURAL AND JURISDICTIONAL BACKGROUND

A. The Berne Injunction

In the first case filed (Civ. No.2000-141), Berne Corporation and B & B Corporation [collectively "Berne"] alleged that the defendants had illegally assessed the value of their commercial properties based on replacement value, rather than the actual value required by federal law. The *Berne* case set the pattern for all the other cases and

[2] The unique or non-common factual and legal issues, including the proof of actual value of the respective properties will be determined in the individual cases.

resulted in a settlement in which the Government agreed to bring the Tax Assessor's Office into compliance with federal law.

Berne sued the acting tax assessor, Roy Martin ["Martin" or "the Tax Assessor"] in his official capacity under Section 1 of the Civil Rights Act of 1871, 42 U.S.C. § 1983. Section 1983 renders certain "persons" liable for deprivations of federal statutory and constitutional rights.[3] The federal statutory right involved here requires that "all taxes on real property in the Virgin Islands *shall be* computed on the basis of the actual value of such property. . . . " 48 U.S.C. § 1401a (emphasis added). Although Berne can not sue a territorial official such as Martin in his official capacity for money damages under section 1983,[4] Berne and the other plaintiffs can and did seek under section 1983 to enjoin Martin from continuing to deprive them of their federal statutory right and to mandate that he assess their property on its actual value as required by that federal statute.[5] Berne included a

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[3] Section 1983 states in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any . . . Territory . . . , subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

[4] *See Nibbs v. Roberts,* 31 V.I. 196, 206 (D.V.I.App.Div.1995) (citing *Ngiraingas v. Sanchez,* 495 U.S. 182, 110 S.Ct. 1737, 109 L.Ed.2d 163 (1990)).

[5] *See Will v. Michigan Dep't of State Police,* 491 U.S. 58, 71 n. 10, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989) ("Of course a state official in his

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taxpayer's suit under 5 V.I.C. § 80, as more fully discussed below.

On September 21, 2000, I ruled "that 48 U.S.C. § 1401a creates a federally protected right actionable pursuant to 42 U.S.C. § 1983." *Berne Corporation v. Government of the Virgin Islands,* 120 F.Supp.2d 528, 535 (D.Vi.2000). I also held that plaintiffs have standing to bring suit under section 80 on behalf of all similarly situated taxpayers to restrain violation of the statute requiring property taxes to be based on actual value. *Id.* Finding that plaintiffs met all the prerequisites, I preliminary enjoined the Government and its Tax Assessor from assessing and collecting commercial property taxes in violation of 48 U.S.C. § 1401a. The Government initially appealed my ruling, but later withdrew its appeal upon reaching a settlement with Berne. Accordingly, this ruling remains binding on the defendants.

B. The *Berne* Settlement

The parties negotiated a settlement of the litigation, which I approved on December 19, 2000. The Government and the Tax Assessor agreed to bring the Virgin Islands real property tax system into compliance with the federal

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or her official capacity, when sued for injunctive relief, would be a person under § 1983 because 'official-capacity actions for prospective relief are not treated as actions against the State.'") (quoting *Kentucky v. Graham,* 473 U.S. 159, 167, n. 14, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985)); *see also Berne,* 120 F.Supp.2d at 533-35 (finding that section 1401a created a federally protected right actionable for injunctive relief under section 1983).

requirement that property be assessed on its actual/market value and to select a special master to

> a. . . . review the procedures and process to be used by the Virgin Islands Tax Assessor's office in appraising commercial properties pursuant to a mass appraisal approach and Uniform Standards of Professional Appraisal Practice (Hereinafter referred to as "USPAP") Standards. For appeal purposes only, USPAP standards for single property appraisal will apply. (*Subject to Jurisdictional Exception of USPAP*)
>
> b. . . . certify the procedures to be used as proper.
>
> c. . . . do appropriate random sampling, of no more than ten percent 10%, of assessments for compliance [and]
>
> d. . . . submit a report to the Court, as to compliance, every 180 days for a period of two (2) years. . . .

(Ex. 10.) I approved the parties' joint stipulation naming Joseph E. Hunt ["Hunt"] as special master on February 14, 2001, and the Government officially retained Hunt on April 16, 2001.[6] Hunt inspected the Tax Assessor's Office

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[6] Hunt is a Lecturer in Public Finance and Government at the University of North Carolina School of Government at Chapel Hill. He has been involved in the field of real property assessment for approximately 35 years, and has vast experience in both single property and mass appraisals. (Hunt Test., Tr. I at 103-105.) Hunt has an MAI designation, meaning that he is a member of the Appraisal Institute, and a CAE ["Certified Assessment Evaluator"] designation from the International Association of Assessing Officers ["IAAO"], of which he is a member and past President. Hunt has authored numerous papers on

(Continued on following page)

in June to familiarize himself with the office's organizational structure and make a preliminary evaluation of the components of the Virgin Islands real property assessment system. In August, Hunt met with Martin, tax consultant Kenneth Voss and other members of the Tax Assessor's Office staff to discuss the Territory's current tax assessment system and what was needed to bring it into compliance with USPAP.

In September 2001, after the Government had issued the 2000 property tax bills based on the concededly illegal methods of assessment, Berne and 21 Queen's Quarter moved to enforce the settlement agreement. At a September 21 hearing, I denied the motion to enforce as premature, noting that the *Berne* Settlement gave the Government two years to bring its assessment system into compliance. I encouraged the parties to continue to communicate and work with each other to establish the new

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various subjects on mass appraisal and property valuations, served on the editing committee of a mass appraisal book published by IAAO, and authored the chapters on the cost approach and cost estimation in a book titled *Property Appraisal and Assessment Administration* published by IAAO, which is an authoritative publication on assessing practices and procedures used throughout the United States. (*Id.* at 102-104.) The IAAO, an organization of approximately 8,500 members, is recognized as the leading authority on property tax administration and mass appraisal in the world. Its function is to conduct educational programs, set standards, and improve the assessment and administration of real property taxation throughout the world. (Id. at 177; Martin Test., Tr. II at 54.) Hunt chaired the work group of IAAO that in 2002 re-wrote Standard 6 of USPAP, which relates to mass appraisals. (Hunt Test., Tr. II at 97, 103-105.) Finally, Hunt has himself been a tax assessor and does a significant amount of consulting throughout the United States on mass appraisal, its application, and assessment administration. (Hunt Test., Tr. I at 102-105; Tr. II at 105.)

assessment system. The Government's delay in implementing the settlement and the 2000 property tax bills, however, allowed other property owners to file lawsuits.[7]

C. The Government Voluntarily Extends the *Berne* Settlement to All Improved and Residential Property

One of these new plaintiffs, Equivest St. Thomas, Inc., successor to Bluebeard's Castle, Inc. ["Equivest"][8] (Civ. No.2001-151), moved on September 14, 2001 for a preliminary injunction to enjoin the collection of its 2000 property tax bills. In their motion to stay all discovery except

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[7] Shell Seekers, Inc., Charles W. Consolvo and Linda B. Consolvo, Snegle Gade Associates, a Limited Partnership, Charles W. Consolvo, Trustee of the Yvette B. Lederberg Trust, Stewart Loveland and Stacy Loveland, and Arthur B. Choate, own commercial and residential real properties in St. Thomas, Virgin Islands and challenge tax assessments for various years from 1994 through 2001. Lindon Corporation owns commercial real property and raw land on St. Thomas and challenges assessments from 1994 to 2001. Gordon L. Coffelt owns agricultural land and challenges assessments from 1992 to 2001. Miller Properties Inc. owns commercial real property on St. Thomas and challenges assessments from 1997 through 2001; Miller Properties also owns commercial real property on St. Croix and challenges its assessments for 1997 through 2001. Cyril V. Francois Associates, LLC, owns commercial real properties on St. Thomas, and challenges assessments from 1999 to 2001. Robert Schmidt, Robert Schmidt Development Corp., Kim Holdsworth, and Dori P. Derr are residents of St. Thomas, Virgin Islands who own improved and unimproved residential real properties and challenge assessments for the above described properties for various years. Elisabeth Sharp is an adult resident of St. Thomas who owns residential properties and challenges assessments from 1996 to 2001.

[8] Bluebeard's Castle, Inc./Castle Acquisitions, Inc. became Equivest by merger on November 1, 2001.

document production "Pending Implementation of Berne Corporation Settlement" filed on December 21, 2001, defendants made a binding judicial admission that "[p]ursuant to the terms of that settlement, all commercial property in the Virgin Islands is to be appraised at actual value in accordance with 48 U.S.C. § 1401a, and 33 V.I.C. § 2404, and in accordance with the Uniform Standards of Professional Appraisal Practice." (Defs.' Mot. to Stay Disc., at ¶ 1 (filed in Civ. No.2001-155).) The defendants specifically represented to the Court that the "new procedures are being implemented with regard to commercial properties first, and when completed, will then be implemented with regard to residential properties." (*Id.* at ¶ 4; *see also* Defs.' Opp. to Plaintiff's Mot. for Prelim. Inj. and Defs.' Opp. to Plaintiff's Mot. to Deem Mot. for Prelim. Inj. Conceded, at ¶ 3 (filed in Civ. No.2001-155) ("It is anticipated that the new system, once implemented, will value all commercial and residential real properties at 'actual values' in accordance with 48 U.S.C. § 1401a and 33 V.I.C. § 2404, and in accordance with the Uniform Standards of Professional Appraisal Practice ("USPAP"), in accordance with the terms of the settlement."); Tr. II at 116-118; Martin Test., Tr. II at 180, 187-188; Tr. Hr'g *Berne v. Government of the Virgin Islands,* Civ. 00-141, Sept. 21, 2001 at 61-62).)

Based in part on these judicial admissions, on January 31, 2002 I granted the defendants' motion to stay all discovery except document production. The Government also asserted willingness to settle all of these cases, but claimed that it could not simultaneously litigate and

implement the new assessment system. Several new plaintiffs were able to negotiate settlements.[9]

D. The Equivest Injunction

On May 21, 2002, Equivest renewed its motion to preliminarily enjoin the collection of its 2000 property tax bills after settlement discussions with the defendants proved fruitless. At a hearing on June 5 the defendants moved to dismiss the case for lack of subject matter jurisdiction and argued that Equivest was not entitled to injunctive relief because it had failed to exhaust its administrative remedy of appeal to the Board of Tax Review. Finding Equivest's claims to be valid and the defendants's arguments to be meritless, I granted Equivest's motion for preliminary injunction in part on June 18, 2002, reaffirmed this Court's federal question jurisdiction and enjoined the Government "from collecting property taxes against the hotel properties owned by Equivest St. Thomas, Inc. until the tax assessor can establish at a trial on the merits that the property taxes on those properties have been assessed on their actual value." *Equivest St.*

[9] On September 19, 2002 the parties to *Chateau St. Croix, LLC v. Government of the Virgin Islands,* Civ. No.2001-173, stipulated to the dismissal of their action after reaching a full settlement. On October 3, 2002, the parties to *Miller Properties, Inc. v. Government of the Virgin Islands,* Civ. No.2001-151, settled their dispute in regard to one of the properties listed in plaintiff's lawsuit, namely Orange Grove on St. Croix. They were unable to reach an agreement on plaintiff's other property, the Buccaneer Mall on St. Thomas. Finally, on the first day of trial, the parties to *Sugar Bay Club & Resort Corp. v. Government of the Virgin Islands,* Civ. No.2001-240, presented to the Court that they had reached a full settlement and did not participate in the trial, although no stipulation of dismissal has yet been filed with the Court.

Thomas, Inc. v. Government of the Virgin Islands, 208 F.Supp.2d 545, 553 (D.Vi.2002), *aff'd sub. nom., Bluebeard's Castle, Inc. v. Government of the Virgin Islands,* 321 F.3d 394 (3d Cir.2003). I also rejected defendants' claim that Equivest had not exhausted its administrative remedies by failing to file an appeal with the Virgin Islands Board of Tax Review.

By this time it had become obvious that the politicians in the Turnbull Administration had decided to litigate rather than to implement the settlement agreement and correct the admittedly broken real property assessment system. With this change in posture, I acknowledged that the Court might have to reconsider the stay on discovery. On July 2, I lifted the stay on discovery and set these cases for trial on October 21, 2002.

E. The Defendants Obstruct the Discovery Process

On August 20, Equivest moved the Court to compel the defendants to respond to its interrogatories and document production requests. Finding that the defendants "ha[d] taken a rather cavalier attitude toward their obligations to supply discovery,"[10] I ordered them to fully

[10] For example, defendants failed to identify the specific documents among the 230 discovery exhibits produced or to identify which of those documents defendants claim were privileged or what documents, if any, had not been produced in reliance on a privilege. Defendants merely referred plaintiffs to the documents produced, or merely asserted that virtually all the document requests were "overbroad" and, for many more document requests, as well as interrogatories, asserted the blunderbuss objection that they sought "irrelevant information, ... confidential information, ... inadmissible information, and ...

(Continued on following page)

and completely respond to Equivest's discovery requests. Two months later, on October 22, I again had to admonish the Government for its "continuing obfuscation of the discovery process and its failure to comply with my August 27th order." *See In re Tax Litig.*, Civ. No.2000-141 *et al.*, 2002 U.S. Dist. LEXIS 22354, at *2 (D.V.I. Oct. 22, 2002) (granting in part Equivest's motion for discovery sanctions and overruling Government's objections to discovery requests).

In the meantime, the defendants moved to continue the October 21 trial date on the ground that they were unable to conduct both discovery/trial preparations and settlement negotiations. At the September 17 hearing, and upon the Government's reasserted willingness to negotiate settlements, I continued the trial to January 6, 2003. At the request of the parties, I also scheduled individual cases for settlement conferences. Unfortunately settlement negotiations promptly broke down again, mainly due to the Government's refusal to disclose the re-appraisal reports of tax consultant Kenneth Voss for the individual properties on the ground of privilege.[11] After reviewing *in camera* those Voss reports that had been completed, I found the Government's claim of privilege to be baseless

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privileged information." I found the Government's approach to discovery totally unacceptable. *See Equivest, Inc. v. Government of the Virgin Islands*, Civ. No.2001-155 (D.V.I. Aug. 28, 2002) (Order).

[11] Sometime during the summer of 2001 the Government hired Kenneth Voss as a consultant to the Tax Assessor's Office for the purpose of implementing the Berne Settlement, although his contract was not officially signed until January 25, 2002. I had ordered the Government to disclose the Voss report to plaintiff Lindon Corporation before the scheduled September 30 settlement conference. The Government, however, refused to turn the report over and the conference apparently never took place.

and ordered the immediate disclosure of the reports to the plaintiffs. *See In re Tax Litig.,* Civ. No.2000-141 *et al.* (D.V.I. Nov. 19, 2002) (Order). When I denied the defendants' motion to reconsider this order, the Government petitioned the Third Circuit Court of Appeals for a stay. Only after the Court of Appeals refused to stay my order on January 9, 2003, three days into the trial of these common issues, did the Government finally turn over the Voss reports to the plaintiffs.

F. This Court Has Jurisdiction over Federal Aspects of the Virgin Islands Property Tax System

On February 28, 2003, the United States Court of Appeals for the Third Circuit upheld this Court's federal question jurisdiction in these matters, ruling that Equivest "properly pled a federal claim" for equitable relief against Roy Martin in his official capacity as tax assessor for violation of plaintiff's federal civil rights under 42 U.S.C. § 1983. *Bluebeard's Castle, Inc. [Equivest] v. Government of the Virgin Islands,* 321 F.3d 394, 396 (3d Cir.2003). Rejecting the Government's contention that there is no federal jurisdiction because this dispute arises solely under Virgin Islands law, the Court of Appeals affirmed that the 1936 federal statute, 48 U.S.C. §§ 1401-1401e, "contemplates a hybrid scheme of real property law: the general requirements are set by the federal government, with specifics established as a matter of territorial law consistent with federal law." *Id.* at 398. Thus, section 1401a's requirement that all real property in the Virgin Islands be assessed at its actual value still binds the Government of the Virgin Islands and its tax assessor.

The principles of federalism and comity do not require the hands-off approach a federal court must adopt regarding the administration of a sovereign state's property tax system because the Virgin Islands property tax law does not derive its local character from the separate sovereignty of a state within the federalism embraced by the Constitution. By the grace of Congress in a self-restrained exercise of its authority under the Territorial Clause of the Constitution and the infamous *Insular Cases*,[12] Congress only requires the Virgin Islands to establish and maintain a system designed to assess the tax on real property's actual

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[12] The present internal governmental structure of the Territory of the Virgin Islands is purely a creature of the United States Congress whose members are selected in elections in which the people of the Virgin Islands have no vote. Congress retains unilateral authority over the Virgin Islands under the Territorial Clause of the Constitution, U.S. CONST. art. IV, § 3, cl. 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States. . . . "), and the *Insular Cases*. *See, e.g., Balzac v. Porto Rico*, 258 U.S. 298, 42 S.Ct. 343, 66 L.Ed. 627 (1922); *Downes v. Bidwell*, 182 U.S. 244, 21 S.Ct. 770, 45 L.Ed. 1088 (1901). For example, the local legislature's power to enact laws is "subject to the power of Congress to annul any such Act of the legislature."). REV. ORGANIC ACT § 8, 48 U.S.C. § 1574(c). As a result, the Territory of the United States Virgin Islands is one of only sixteen "non-self-governing territories" remaining in the world today. *See* Information from Non-Self-Governing Territories transmitted under Article 73e of the Charter of the United Nations, U.N. GAOR, 57th Sess., U.N. Doc. No. A/57/23 (Jul. 8, 2002) ["Information from Non-Self-Governing Territories"]. Being a non-self-governing territories [sic], the Virgin Islands continues to be subject to the efforts of the "Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples," and the United States must report to the United Nations on its progress toward the decolonization of the Virgin Islands. *See id.* (annex).

value. The local Government otherwise has complete autonomy over its property tax system.

As the Court of Appeals found, the Virgin Islands "tax system is not a state tax system, nor is it entirely a territorial tax system. It is partially a federal tax system, and it is not apparent that the federal government should adopt a hands-off approach to the federal aspects of a hybrid federal/territorial system." *See Bluebeard's Castle,* 321 F.3d at 400. Thus, for example, this Court is not subject to the prohibition on tax injunctions under the Tax Injunction Act, which prevents a district court from enjoining, suspending or restraining "the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. § 1341. The Tax Injunction Act simply does not apply to the District Court of the Virgin Islands. *See Equivest,* 321 F.3d at 397 n. 5; *Pan Am. World Airways v. Government of the Virgin Islands,* 459 F.2d 387, 391 (3d Cir.1972).

The Court of Appeals went on to limn this Court's federal question jurisdiction in these cases.

> Congress was not required to treat the Virgin Islands as though it were sovereign, but in large measure it has chosen to do so. The tax system is, for the most part, a matter of local governance. And the territorial courts, mirroring state courts, have been given primary jurisdiction over local matters. Accordingly, although § 1401a adds a significant federal element to the Virgin Islands tax regime, it remains a local system – created, enforced, and adjudicated locally. . . .
>
> . . . .

> [Thus, a]n aggrieved taxpayer does not state a federal claim by objecting that its taxes are not based on the actual "actual value" of its property. If an assessor arrives at a figure greater than what the taxpayer believes to be the correct number, the assessor has not necessarily violated the requirement that the tax assessment be based on actual value. Only if the assessment *method* does not constitute a reasonable attempt to determine the actual value can a claim be brought under § 1401a. A challenge to the *system* of tax assessments in federal court may be permissible depending on whether it directly implicates federal law; an ordinary challenge to an assessment must be brought in territorial court.
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> Plaintiff here has adequately alleged a violation under 48 U.S.C. § 1401a. It contends defendants systematically employed a method of assessment not calculated to determine the actual value of its properties. Because plaintiff's claims "arise under" § 1401a, they are subject to the jurisdiction of the District Court under 48 U.S.C. § 1612 [granting jurisdiction of United States district court] and 28 U.S.C. § 1331 [granting jurisdiction over federal questions].

Id. at 401, 402 (citation omitted).

G. This Court Has Supplemental Jurisdiction over Plaintiffs' Taxpayer Suit (5 V.I.C. § 80)

The *Berne* plaintiffs included a taxpayer's suit under Virgin Islands law to restrain Martin from assessing and the Government from collecting property taxes on real property in the Virgin Islands until such assessments and taxes are redetermined based on the actual value of each property. *See* 5 V.I.C. § 80 ("A taxpayer may maintain an

action to restrain illegal or unauthorized acts by a territorial officer or employee, or the wrongful disbursement of territorial funds."). This Court has supplemental jurisdiction over plaintiffs' non-federal, territorial taxpayer suits authorized by Virgin Islands law pursuant to 28 U.S.C. § 1367(a) (district courts having original jurisdiction "shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy"). The plaintiffs have since expanded their claims under section 80 to include injunctive and declaratory relief against the Government and its Board of Tax Review for consistently failing to comply with the Board's enabling legislation.

IV. THE SYSTEM OF PROPERTY TAX ASSESSMENT

A. The Purpose

Although this case mainly involves the role and methodology of the Executive Branch acting through its Tax Assessor, it is equally important to acknowledge that the Legislature has utterly failed to understand and perform its role in this process. The roles of the three branches of government in taxing property in the Territory of the Virgin Islands are well stated in the 1970 manual used by the Tax Assessor, outdated though it may be as a guide for the Tax Assessor's Office.

> All three branches of government – the legislative, the executive, and the judicial – are involved in the taxation of property. The revenue to be derived from property is a decision of the legislative body, but before the amount of revenue can be determined by fixing the tax rate, the

> executive branch, through the assessor, must establish the property tax base on which taxes are to be computed by determining the valuation of taxable property. The function of the judicial branch is to review, on appeal, the legality of legislative and administrative acts. . . .

(Def.'s Ex. G1, Introduction to REAL PROPERTY ASSESSMENT, Manual of Procedures 3 (2d ed. 1970) ["Manual"].)[13] The Legislature has never lived up to its responsibility to determine how much revenue property taxes should contribute to the overall budget of the Virgin Islands Government. The best evidence of this shirking of legislative responsibility is the fact that the Legislature has never changed the tax rate of 1.25 percent (0.0125) since it was set by Congress in 1936 – almost seventy years ago. This is relevant to these proceedings because it lends itself to abuse, as the special master, Joe Hunt, observed.

Hunt discussed the interplay between the roles of the Legislature in setting the budget and tax rate and the Executive assessing the property values. He described them as the "assessment function", the "budget function", and the "property tax levy".

> [T]he *assessment function* produces a taxable assessment base for all property in the jurisdiction. The assessment base is used to distribute the property tax to property owners according to the

[13] The Manual was originally published in 1960 and revised in 1970. It purports to contain the policies and procedures of the Tax Assessor's Office for the tax assessment of all properties in the V.I. and was admitted in evidence as the Court's Exhibit 3.

> value of the property owned. The *budget function* determines how much money must be raised by the property tax. The *levy* is the legal act of enacting the property tax to raise the required amount of money necessary to fund governmental expenditures. The levy is expressed as a property tax rate. The resulting property tax rate is simply the total dollar amount of the jurisdiction's budget (that will be funded by the property tax) divided by the total assessment base. When the tax rate is multiplied by an individual property assessment, the tax for that property will be calculated.
>
> . . .
>
> If assessment values are not tied to some uniform measure of value (Market Value) and applied in the same manner to all properties, the result is a shift of the property tax from one group of taxpayers to another group. . . .

The assessed value is not intended to function as the means to increase or decrease revenue to the jurisdiction because value is controlled by market influences and not by budgetary needs, and therefore is not reliably predictable. . . . (Ex. J-3, Special Master's Report, July 24, 2002, at 3-4 (underline in original; italics added).)

Joe Hunt went on to report that, "[h]istorically, the Virgin Islands Government has not adjusted the property tax rate to fund increasing budget demands," and that this "inability or reluctance to adjust the tax rate to reflect changes in the government's budget puts an undue amount of pressure on assessment levels." (*Id.* at 6.) At trial Hunt testified that he was concerned "over the integrity of the property tax system" because the tax rate

had been static for so many years. (Hunt Test., Tr. 1 at 154.)

The Tax Assessor's thirty-year-old Manual also describes the role of the assessment function.

> The primary objective of the assessment function is to provide the basis for spreading the levy on property in proportion to the value of each individual's ownership, thereby establishing the proportion of the tax burden each is to bear. The omission of property or its under valuation results in an increase in the amount which the owners of other property not so favored must pay. The assessor – and, with him, the board of Tax Appeals [Tax Review] – are charged with a responsibility that is vital to the interests of each and every owner of taxable real property in the Virgin Islands.

(Manual at 3.) In addition to the Legislature's abdication of its responsibilities, the system of assessment as presently established and operated by the Tax Assessor is structurally incapable of equitably and reliably implementing the federal statutory mandate of taxing all real property on its actual value. Moreover, the Board of Tax Review is utterly useless as a safety net to correct the Tax Assessor's systemic errors.

B. Some Definitions

Actual value equals fair market value. The terms actual value and fair market value are synonymous and may be used interchangeably, per the former Tax Assessor,

(*see* Callwood Test., Tr. I at 250-251, 255),[14] as confirmed by the Special Master, and plaintiffs' experts Kathleen Conroy and Steven Jamron, (*see* Hunt Test., Tr. I at 112, 203; Conroy Test., Tr. IV at 225-226, 229-230.) Similarly, the Tax Assessor's Manual indicates that real property should be taxed on market value. (*See* Manual at 12 ("there has emerged a term that has been sanctioned by the courts as the accepted concept of value for assessment purposes and on which taxes are to be computed. This term is market value.").) The equivalence of actual value and market value is clinched by the web site for the Office of the Tax Assessor:

> The Tax Assessor does not dictate values. The actual value is determined from the market. This is the amount that your property may bring in the open market between a willing buyer who is fully informed of all the advantages and disadvantages of your property and as a willing seller is

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[14] The Tax Assessor's inconsistent testimony under oath was both disingenuous and threatening to his continued liberty. Compare Martin's sworn testimony at trial:

> Q: Is it the position of the Tax Assessor of the Virgin Islands that "actual value" as used in Section 2404 is synonymous with the term "fair market value"? Just "yes" or "no".
>
> A: No.

with Martin's deposition testimony of December 11, 2000 under oath:

> Q: [W]ould you agree that the terms "market value" and "actual value" are essentially the same?
>
> A: Yes.

(Martin Test., Tr. I at 266. *See also* Martin Test., Tr. I at 265-268, 275-276; Martin Test., Tr. II at 55-56, 265-266.)

> fully informed and under no duress to sell would accept.

(Ex. J-9, www.ltg.gov.vi/departments/taxdetail.html.)

Mass Appraisal/Single Property Assessment. Mass appraisal is "the process of valuing a universe of properties as of a given date using standard methodology, employing common data, and allowing for statistical testing." (Ex. J-2, Special Master's Report, Jan. 15, 2002, at 2.) The components needed to produce a credible and reliable mass appraisal are a good mapping system, a good database that describes all the appropriate property characteristics, an analysis system to convert market data to assessment values, a trained and competent staff able to interact with the system and to review the estimates of value of the system, a data processing system able to handle the requisite number of appraisals on an annual basis, and a review system to verify the quality of the valuations and compliance with statutory requirements. (Hunt Test., Tr. I at 117-118.) In contrast, a single property appraisal is an appraisal of a single property to produce an estimate of its actual value. (*Id.* at 118.)

Market value for property tax assessment purposes is generally determined through the application of mass appraisal techniques. Although the techniques differ between a mass appraisal and a single property appraisal, the goal of both techniques is the same, namely, to arrive at the actual/fair market value of real property. (*Id.* at 120.) Because both a mass appraisal and a single property appraisal attempt to reach an accurate estimate of a property's the [sic] market value, a single property appraisal is a valid and recognized means of checking a mass appraisal valuation. (*Id.* (agreeing that "the goal of the

mass appraisal system is to arrive at a value for each individual parcel subject to the assessment that would be roughly equal to the fair market value as determined by a single property appraisal.").) For this reason, it is accepted practice, both generally and by the Office of the Tax Assessor, to consider an individual appraisal in determining the accuracy of a mass appraisal valuation. (Callwood Test., Tr. I at 258; Martin Test., Tr. VI at 156-157; Jamron Test., Tr. V at 54.)

Uniform Standards of Professional Appraisal Practice. USPAP is the generally accepted and recognized minimum standards of appraisal practice in the United States. (*See* USPAP, Forward (Appraisal Standards Board, 2002); Hunt Test., Tr. II at 97-98, 104.) Standard 6 of USPAP, "Mass Appraisal, Development and Reporting" specifically applies to mass appraisals and requires that, "[i]n developing a mass appraisal, an appraiser must be aware of, understand, and correctly employ those recognized methods and techniques necessary to produce and communicate credible mass appraisals." The term "appraisal" or "mass appraisal" refers to the process which produces a value; "assessment" is the statutory conversion of appraised value to taxable value, (*see* Hunt Test., Tr. II at 99); the Virgin Islands defines the assessed value as the actual value of the property, although the tax is levied on sixty percent of the assessed or actual value, *see* 33 V.I.C. § 2301(a).

The "Jurisdictional Exception Rule" of USPAP, mentioned in the *Berne* Settlement, states that, "[i]f any part of these standards is contrary to the law or public policy of any jurisdiction, only that part shall be void and of no force or effect in that jurisdiction." The purpose of this rule is strictly limited to providing a saving or severability

clause to preserve the balance of USPAP if one or more of its parts is contrary to the law or public policy of a jurisdiction. (USPAP, Comment to the Jurisdictional Exception Rule at 8.)

IAAO Standard on Ratio Studies. One of the recognized methods of evaluating the reliability and credibility of the assessment values produced by a mass appraisal system is through "ratio studies". (Hunt Test., Tr. I at 179-180; Callwood Test., Tr. I at 259; Martin Test., Tr. II at 65-66.) A ratio study is a generic term for any comparison of assessed values estimated for tax purposes with market values derived independently from actual recorded sales prices or independent appraisals. The components of the ratio are the tax assessor's assessed values as the numerator and the independently derived market values as the denominator. (Standard on Ratio Studies §§ 5.1.2 and 5.1.3 (IAAO 1999); Hunt Test., Tr. I at 180.) Obviously, the ideal is a ratio of 1, which happens when assessed value equals market value (assessed / market = 1). Assessors and taxpayers can use ratio studies to evaluate how fairly the computer's mass appraisal program distributes the real property tax burden, that is, how close appraised/assessed values approximate actual/market values. (Standard on Ratio Studies § 2.3.3; Hunt Test. Tr. I at 178.)

Unfortunately, the Virgin Islands does not have its own ratio study performance standards, (Martin Test., Tr. II at 76-78), even though Martin is a member of the IAAO and the IAAO standards state that "each state, province, and local jurisdiction should have ratio study performance standards." (Standard on Ratio Studies § 14 (Ex. J-11); Martin Test., Tr. II at 53.) Moreover, USPAP standards and IAAO standards are "fairly synonymous". (Hunt Test., Tr. II at 97.) For example, Canon 6 of the IAAO Code of

Ethics and Standard of Professional Conduct requires all IAAO members to comply with USPAP. Indeed, IAAO Ethical Rule 6.1 states that it is unethical for an IAAO member to fail to observe the requirements of USPAP. Martin claimed that ratio study performance standards for the Virgin Islands are in the Manual, but never was able to point them out to the Court. The Manual does warn, however, that, "[i]f the difference between the stated consideration and the appraised value is significant, it is a signal that there may be something wrong with the appraisal." (Manual at 108.)

In lieu of any local ratio study performance standards to assess the Tax Assessor's performance and compliance with the *Berne* Settlement, the plaintiffs presented at trial and the Court adopts the IAAO's suggested ratio study performance standards for jurisdictions where market/actual value is the legal basis for assessment. These are set forth in Table 7 of the Standard on Ratio Studies, according to which "[t]he overall level of appraisal of the jurisdiction and each major class of property (such as residential, commercial/industrial, and vacant land) should be between 0.90 and 1.10 (within +-10 percent of the statutorily required level of assessment)." (Standard on Ratio Studies at § 14.1 & Table 7; Hunt Test., Tr. I at 122-123.)

C. The Three Main Appraisal Approaches or Models

The three main approaches to appraising real property, the cost approach, the sales comparison approach and the income approach, all may be used in either a mass appraisal system or a single property appraisal. The goal of all three is to reach a reliable estimate of the actual, *i.e.*,

fair market value of real property. The cost approach and the sales comparison are not defined or even mentioned in the relevant provisions of the Virgin Islands Code, mainly 33 V.I.C. § 2404. Although the income approach is defined in section 2404(b), the Tax Assessor can use it only if it increases the assessed value. All three approaches, however, are set forth in the Manual, which the previous Tax Assessor described as his "bible". (Callwood Test., Tr. 1 at 236.)

The *cost approach* to appraising property improved with structures begins with the replacement cost new of the improvements, subtracts depreciation, whether physical or caused by functional or economic obsolescence, then adds in the value of the underlying land. The land value is most frequently determined by the sales comparison approach. The cost approach is based on the principle that a rational, informed purchaser would pay no more for a property than the cost of constructing an acceptable substitute. The cost approach is thus less reliable when an informed buyer in the marketplace would be inclined to pay less for an improved property than the cost to replace the buildings on it. This often is the case for income producing property, because the buyer will rely more on the income the property generates rather than what it would cost to replace it, and for older structures as well, where depreciation is subjective and difficult to measure.[15]

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[15] *See In re The Greens of Pine Glen, Ltd.*, 147 N.C.App. 221, 555 S.E.2d 612, 615 (N.C.App.2001) (stating that "[t]he cost approach is better suited for valuing specialty property or newly developed property; when applied to other property, the cost approach receives more criticism than praise" and noting that "modern appraisal practice is to

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The *sales comparison approach* estimates a property's value by reference to fair market sales of comparable properties. This approach is generally viewed as the most reliable of the three approaches since there is no better evidence of market value than recent sales of comparable property in the marketplace between a willing and knowledgeable buyer and a willing seller dealing with each other at arms length. (*See, e.g.,* Standard on Ratio Studies § 2.1 (IAAO 1999) ("Sales prices provide the only objective estimates of market values and under normal circumstances should provide good surrogates of market value"); Callwood Test., Tr. I at 238 (if sufficient market information is available, comparable sales is the "best answer, because the answers are already there"); Martin Test., Tr. IV at 39.)

The *income approach* to valuation is based on the concept that current value is the present worth of future benefits to be derived from the income the asset can be expected to produce over the remainder of its economic life. The income approach uses capitalization to convert the projected benefits into an estimate of present value. This generally is the most reliable approach to valuation for income producing properties. (Callwood Test., Tr. I at 238 (after comparable sales, income approach is the "next best" approach); Conroy Test., Tr. IV at 254-255.)

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use cost approach as a secondary approach 'because cost may not effectively reflect market conditions.' ") (citations omitted)).

V. THE DEFENDANTS ARE VIOLATING FEDERAL LAW

A. The Virgin Islands Statutory Scheme for Real Property Assessment Violates the Federal Requirement to Tax Actual Value by Allowing the Use of the Income Approach Only if it Increases the Assessed Value of Commercial Property and by Restricting the Maximum Annual Increase for Residential Property to Ten Percent

The Virgin Islands Legislature added subsection (b) to 33 V.I.C. § 2404 in 1985 to restrict the tax assessor from using the income approach for assessing commercial property *unless* it "results in a greater assessment than if it is not utilized." *See id.* § 2404(b).[16] The Tax Assessor clearly interprets 2404(b) as prohibiting him from using the income approach to reduce a commercial property owner's assessment, except in negotiations to settle a case in litigation. (Martin Test., Tr. II at 196-97.) Such a restriction directly conflicts with the clear mandate of

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[16] Section 2404(b) provides as follows:

> If the property being assessed is commercial property, the assessor may utilize a capitalization of income method of assessment in conjunction with utilization of the factors listed in subsection (a) of this section so long as the utilization of such method results in a greater assessment than if it is not utilized. For purposes of this section, the "capitalization of income method" is a method of assessing commercial property by the conversion of rent to the real property value by the utilization of a capitalization rate applicable to the type of property involved. Determination of the capitalization rate shall be made by the Tax Assessor of the Virgin Islands after careful consideration of the comparable rate used by lending institutions.

federal law that all taxes on real property in the Virgin Islands be computed on the basis of actual value. (*See* Hunt Test., Tr. I at 107 (Section 2404(b) "is inconsistent with the expected estimates or research that an appraiser would do to estimate value described as actual market value").) Section 2404(b) must therefore be stricken as inconsistent with 48 U.S.C. § 1401a. I hardly need experts to tell me that section 2404(b)'s directive that the income approach be used only for the purpose of increasing the assessment constitutes a statutorily mandated "method of assessment not calculated to determine the actual value of its properties," to use the words of the Court of Appeals.

The experts merely confirmed that section 2404(b) is inconsistent with a determination of market or actual value, because investors in the marketplace use the income approach to determine value even if it decreases the property's value.[17] Thus, section 2404(b) effectively creates unequal rates of taxation between non-commercial properties, which are to be taxed on fair market value, and plaintiffs' commercial properties, which are to be taxed without using the appraisal approach most appropriate for evaluating commercial properties. Martin testified that he

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[17] (*See* Conroy Test., Tr. IV at 238-239 (stating that one could never have any type of credible result, uniformly arrived at, if section 2404(b) applied); Hunt Test., Tr. I at 162 (assessed value of commercial property with section 2404(b) applicable is not likely to equal fair market value); *id.* at 185-186, 555 S.E.2d 612 (section 2404(b) requires you to handle the income approach in a manner that is not considered supportive of a valuation that complies with a market value standard).) *See also Brummel v. Department of Revenue,* 1998 WL 201394 (Or.Tax Apr.17, 1998) (stating that the "law cannot mandate a rule which operates contrary to economic realities and at the same time requires real market value assessments").

has used only the cost approach to determine the value of improvements on all commercial properties during his tenure as acting Tax Assessor.[18] (Martin Test., Tr. VI at 111-14.) As will be discussed in the next section, the evidence confirmed that plaintiffs commercial properties indeed are being taxed on values artificially inflated above market value.

Although the parties did not dwell on it, 33 V.I.C. § 2402(a) restricts the ability of the Tax Assessor from fairly and reliably determining the actual or fair market value of residential property, except this time it skews the system in favor of the taxpayer. (*See* Martin Test., Tr. III at 59 (mentioning the additional statutory restriction.) Such a restriction again is inconsistent with the standard methods and expected research an appraiser would otherwise use to estimate actual market value.[19] Similarly, I do

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[18] Verne Callwood was the Tax Assessor before January, 1999, and used only the income approach to assess commercial real property during his tenure. He retired after serving in that position for approximately thirty-eight years and was responsible for all tax bills up to, but not including, the 1999 tax year. (Callwood Test., Tr. I at 232.)

Roy Martin has been serving as the *de facto* Tax Assessor of the Virgin Islands since January, 1999. (Martin Test., Tr. I at 264.) He is the *de facto* Tax Assessor because he did not fulfill the statutory requirement of taking an oath of office or posting a bond before taking his position. (Tr. II at 227-228.)

[19] Section 2402(a) provides as follows:

> (a) The tax assessor shall at least once every five (5) years, upon actual view, value and assess all noncommercial property subject to taxation in the Virgin Islands. Provided, however that the tax assessor shall not increase the valuation and assessment of noncommercial property more than 10% over the previous valuation and assessment except in the following cases:

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not need experts to tell me that this restriction directly conflicts with the clear mandate of federal law that all real property in the Virgin Islands be assessed its actual value. Section 2402(a) thus constitutes a statutorily mandated method of assessment not calculated to determine the actual value of residential real property. Accordingly, section 2402(a) must also be stricken as violating 48 U.S.C. § 1401a.

Section 2404 originally implemented the federal value-based property tax by setting forth nine factors for the assessor to consider in computing the actual value of real property: location and surroundings; quality or fertility; condition of structures; recent cost to the present owner; recent sale price of adjacent property; recent bona fide offer; accessibility; proximity to public facilities, conveniences and utilities; and rental or income derived directly from the property. *See* 24 V.I.C. § 2404(a). Martin interprets and implements section 2404(a) as an exclusive

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(i) Where there has been an improvement to the subject real property subsequent to the previous valuation and assessment. Provided, however, that there shall be no increase over the 1987 assessed valuation except where there have been improvements which exceed $50,000.

(ii) Where there has been an improvement to the improvement, which occurred subsequent to the previous valuation and assessment. Provided, however, that there shall be no increase over the 1987 assessed valuation except where there have been improvements which exceed $50,000.

(iii) Where the subject real property has been sold subsequent to the previous valuation and assessment.

list of the only factors he can consider in determining the actual market value of real property. (*See* Martin Test., Tr. II at 56-57.) According to plaintiffs' expert, interpreting section 2404(a) as an exclusive list of assessment factors would be inconsistent with the assessment of actual value required by 48 U.S. § 1401a because these nine factors are

> not in and of themselves totally adequate for someone to determine market value. . . . [T]hey are incomplete in giving a professional appraiser or assessor all of the tools that you need to conduct an appropriate . . . development of an appraisal process and apply methodologies and arrive at a reasonable and supportable opinion of value.

(Conroy Test., Tr. IV at 232-33; [20] *see* Hunt Test., Tr. I at 188 (noting that his opinion that USPAP could be followed

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[20] In her expert report, "Report on Specific Issues Related to 48 U.S.C.A. § 1401a and 33 V.I.C. § 2404" (Ex. J-41), Conroy grouped section 2404(a)'s 9 factors into three categories derived from USPAP: "property characteristics", "transactional history of a given property", and "recognized valuation methods and techniques". (Ex. J-41, at 3-7.) Conroy opined that section 2404(a)'s factors alone could not produce credible assessment values because several important factors were excluded. For instance, the statute does not allow the Tax Assessor to consider significant property characteristics such as fractional interests and partial holdings, legal attributes such as easements, restrictions, encumbrances, reservations, covenants, lease contracts, declarations, ordinances, land use regulations, trade fixtures and intangible items within the property, supply and demand for a given type of property and related market area trends, and the highest and best use of a site or improved property. (*Id.* at 4-5.). Similarly for a property's transactional history, the statutory factors of cost and recent bona fide offer were insufficient because they limited the Tax Assessor to recent costs and offers, rather than all transactions within a defined period. (*Id.* 5.). Finally, regarding the valuation method category, section 2404(a) completely fails to provide for any of the recognized valuation

(Continued on following page)

under § 2404(a) was premised on being able to consider factors in addition to those set forth in § 2404(a)).) In contrast to Martin's testimony at trial, the defendants' have taken the position in written pleadings that section 2404(a) "does not require exclusive application for the computation of actual value," and that nothing in its plain language limits "the tax assessor's consideration to only those nine elements listed." (Tr. II at 116-117.) Inasmuch as the Legislature will have to revisit the entire subtitle on real property taxes, namely Subtitle 2 of Title 33, Virgin Islands Code, Sections 2301-2584, to revise section 2404 and the other sections specifically mentioned here, and to modernize many more provisions, I will not formally rule that section 2404(a) is also voided by 48 U.S.C. § 1401a.

I find that plaintiffs have proved their federal claim that Roy Martin, acting in his official capacity as the Tax Assessor for the Government of the Virgin Islands, violated plaintiffs' civil rights under 42 U.S.C. § 1983 by systematically employing a method of assessment not calculated to determine the actual value of properties, as required by 48 U.S.C. § 1401a, namely, he did not use the income capitalization approach in appraising and assessing plaintiffs' commercial properties and abided by the limitation on the assessment of residential property imposed by 33 V.I.C. § 2402(a).

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approaches or methodologies, let alone require their use. (*Id.* at 6; and *see generally,* Conroy Test., Tr. IV at 231-39.)

B. The Tax Assessor Violates Plaintiffs' Civil Rights under 42 U.S.C. § 1983

As already noted, Martin has only used the cost approach to determine the value of improvements on all commercial properties during his tenure as acting Tax Assessor. I agree with the evidence that it is not consistent with USPAP to use only the cost approach if there are other methodologies or data that should be taken into consideration to arrive at fair market value. (*See* Conroy Test., Tr. IV at 252.) Even Martin stated on several occasions in testimony under penalty of perjury that using the cost approach exclusively did not conform to USPAP. (*See* Martin Dep. at 21-28, Dec. 19, 2002; Tr. of Prelim. Inj. Hr'g, *Equivest v. Government,* Civ. No.2001-155, at 91-92, June 2, 2002.) In another baffling instance of varying his testimony under oath, Martin changed his position at trial to say that exclusive use of the cost approach to assess commercial real estate would comply with USPAP. (*See* Martin Test., Tr. II at 59-60.)

1. Ratio Studies: Confirmation that Martin's Mass Appraisal is not Calculated to Assess Actual Value

One of the clearest pieces of evidence confirming that the present practices and procedures employed by the Tax Assessor's office to appraise real property are flawed and generate fundamentally unfair and unreliable assessments is plaintiffs Joint Exhibit 13. Exhibit J-13 is the sales ratio study for St. Thomas from January 1, 1997 through December 31, 1999 of only the "qualified" sales of

improved real property, *i.e.*, it lists only land sales or sales of improved property that qualify as arms-length transactions. (Tr. II at 79, Martin Test., Tr. II at 119-120.)[21] All parties agree that property sales that are not arms-length transactions are not appropriate for inclusion in a sales ratio analysis. Only sales of improved real property were analyzed in Joint Exhibit 13 because the majority of the plaintiffs' properties include improved real estate. Ideally, the ratio of Martin's assessed values to actual sales values at arms length would be 1, that is, the estimated values established by Martin's assessment system would equal the actual value in the marketplace. An acceptable ratio short of the ideal according to the Standard on Ratio Studies would be "between 0.90 and 1.10," *i.e.*, within +-10 percent of actual value. (Standard on Ratio Studies at § 14.1 & Table 7; Hunt Test., Tr. I at 122-123.)

At face value, the raw numbers on Exhibit J-13, produce an assessment to sales ratio of 0.90, taking the aggregate value of assessments of improved real property of $243,003,827 as the numerator and the aggregate value

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[21] USPAP requires that the quality and accuracy of a mass appraisal be verified. (*See* USPAP, Standard Rule 6.6.) Martin first testified that his office used ratio studies to validate the accuracy of his assessments, (Martin Test., Tr. I at 303-304; Tr. II at 65-66; Tr. III at 29), but after the reliability of these ratio studies was discredited, Martin backpedaled to say that his office does not "look in-depth as to the mathematical calculations in the report" and uses the ratio report only to "compare the sales price to the assessments and to make whatever re-reviews in the field that may be required," (*id.*, Tr. II at 73-74; Tr. III at 17, 33.) In other words, Martin did not analyze the ratios in the sales ratio reports, (*id.*, Tr. III at 40-43), as would be expected from Martin's testimony that he was unaware of the acceptable ranges of performance standards for ratio studies as promulgated by IAAO, (*id.*, Tr. II at 73.)

of arms-length market sales of improved real property of $268,702,405 as the denominator (243,003,827 / 268,702,405 = 0.9). A ratio of 0.9 is at the outer edge of the acceptable IAAO performance range and only 10 percent off the ideal ratio of 1. Without further examination of the underlying sales data, a ratio of 0.9 would tend to indicate that Martin's assessments undervalue improved real property, *i.e.*, that improved property sold for more than its assessed value. As plaintiffs painstakingly demonstrated at trial, however, Martin made a number of serious errors that grossly distorted the sales prices of several of the qualified properties, (*see* Tr. II at 119-178), such as, counting one transaction of several parcels of property at one total dollar figure as separate sales of each parcel at the dollar figure. For example, Martin listed Equivest's purchase of the seven Elysian Hotel properties for a total of $13,000,000 as *$13,000,000 for each of the individual seven parcels!* Although Martin allocated separate assessed values to each of the individual parcels, he listed the full $13,000,000 seven times, once for each the seven properties. From this transaction alone, then, the aggregate sales value was overstated by $78,000,000 (6 x $13,000,000). All in all, Martin had to concede that over $109,750,000 was improperly included in the aggregate value of qualified arms-length sales of improved property listed on Exhibit J-13, which reduced the denominator of the ratio from $268,702,405 to $158,952,405. The corrected and more accurate proportion of $243,003,827 divided by $158,952,405 gives a ratio of 1.53, rather than 0.9. This means that Martin's method of mass appraisal assesses improved real property in the Virgin Islands an average of one-and-one-half times its actual, market value. Thus, one of the universally recognized method [sic] of evaluating the reliability and credibility of the assessment values

produced by a mass appraisal system conclusively confirms that Martin's system of assessment is not reliable, not credible, and fatally flawed.

2. Building Costs: Unreliable and Overstated

The replacement cost new values generated by the Tax Assessor for plaintiffs' properties generally are unreliable, incredible, and overstated. (*See* Jamron Test., Tr. V at 88.) For example, Martin's per square foot building costs are significantly overstated. (*Id.* at 89-90 (noting that the Tax Assessor's replacement cost new figures were "much too high").) In his July 24, 2002 report, special master Hunt stated that his review of the documents and materials at the Tax Assessor's office revealed no reliable market research or documentation to support that the "replacement cost used in the current system has any relationship to actual cost of construction in today's market." (Ex. J-3, Special Master's Report, July 24, 2002, at 9.) Hunt went on to add that the periodic, across-the-board increases to the costs tables described by Martin at trial "increase [ ] concern for accuracy of cost rates in the existing system." (*Id.*) I find Hunt's evidence to be credible, independently adopt his finding, and share his concern for the accuracy of the costs used by the Tax Assessor.

Kenneth Voss, the Tax Assessor's expert consultant, performed single property appraisals of certain of plaintiffs' commercial properties using the cost approach, all of which were significantly lower that [sic] those of the Tax Assessor using his computer assisted mass appraisal program. The table immediately following compares the respective cost approach values for these properties. The first column lists Martin's values, the second lists Voss'

values, and the third shows the percent by which Martin's values exceed Voss' values.

	MARTIN	VOSS COST	DIFFERENCE
Shell Seekers	$1,307,660	$1,167,000	12.1%
21 Queen's Quarter	$3,679,780	$2,715,000	35.5%
Frostco Building	$4,962,619	$3,065,000	61.9%
Buccaneer Mall	$7,361,385	$6,625,000	11.1%
Orange Grove Apts.	$5,190,325	$3,732,000	39.1%

The unreliability and inaccuracy of Martin's appraisals is even clearer when I compare Voss's values using the appropriate income approach to Martin's values using the inappropriate cost approach:

	MARTIN	VOSS COST	DIFFERENCE
Shell Seekers	$1,307,660	$1,116,000	17.2%
21 Queen's Quarter	$3,679,780	$2,591,000	42.0%
Frostco Building	$4,962,619	$2,859,000	73.6%
Buccaneer Mall	$7,361,385	$6,576,000	11.9%
Orange Grove Apts.	$5,190,325	$2,100,000	47.2%

In every instance, the Tax Assessor's methodology produced a statistically significant higher value than his own expert. Martin tried to explain the difference, at least in regard to the cost approach, by criticizing Voss's use of Marshall & Swift Valuation Service ["MVS"] for cost data

as not being representative of Virgin Islands building costs, notwithstanding that MVS is "an industry recognized cost estimation source which [courts] generally find helpful," *Industrial Equities Group, LLC v. County of Anoka,* 1999 WL 1116799 *3 (Minn. Tax Ct. Nov. 30, 1999), and notwithstanding that Voss used adjustments to the MVS data "including the appropriate local and current cost multipliers." (*See, e.g.,* Summ. Appraisal Report of The Frostco Building at 27 (Ex. J-50).) One of plaintiffs' expert appraisers, Steven Jamron, also testified that the MVS cost estimates include adjustments for Virgin Islands building costs and that MVS is a reliable source of cost information. (Jamron Test., Tr. VII at 11-12, 18.) I find Jamron's testimony on this issue to be credible, and the Tax Assessor's testimony relating to his costs data not to be credible, as shown by the discrepancy between his figures and those of his consultant.

3. Depreciation: Unreasonable and Erratic

The second step of the cost approach is to subtract the accumulated amount of depreciation from the replacement cost new of the improvement. The longer the period, the slower the depreciation accumulates and the higher the appraised value will be. Further evidence of the Tax Assessor's systematic failure to produce reliable actual values through exclusive use of the cost approach to assess plaintiffs' properties is his selection and application of depreciation, very often a 110 year straight-line depreciation schedule. All the expert appraisers testified that a maximum of sixty years might be acceptable in some instances, although a thirty- to forty-year depreciation schedule was more appropriate, and that a 110 year depreciation period was unreasonably long. (Conroy Test.,

Tr. IV at 254-255; Jamron Test., Tr. V at 84-85.) Significantly, Martin's own expert consultant, Kenneth Voss, used forty- to sixty-year depreciation periods rather than 110 years. (Martin Test., Tr. VI at 176-177.)

Further compounding the problems with the Tax Assessor's application of the cost approach is his unfathomable practice of arbitrarily resetting the "effective year" of a building's construction, rather than the actual year of construction, for commencing depreciation. Even though it may be necessary or appropriate to estimate the effective year of construction when the actual year cannot be determined or the building has sufficiently changed by remodeling or alterations, (*see* Manual at 211), the Tax Assessor has moved the effective year to a later year and thereby significantly reduced the accumulated depreciation of plaintiffs' properties without any indication that the properties had been remodeled and in the face of evidence that they needed significant repairs. Martin offered little evidence to support his office's designation of the effective year of construction of plaintiffs' properties, and I find that this manipulation of effective age of plaintiffs' properties unreasonably lowered their depreciation and artificially increased their assessed value so that it bears little relation to actual value.

4. Land Values: Unreliable and Unverifiable

The third and last step of Martin's use of the cost approach, adding the land value to the depreciated cost of the improvements, is also calculated systematically to produce unreliable estimates of actual value. Martin testified that he used a computer printout of sales between 1997 and 1999 of comparable vacant parcels throughout

the Virgin Islands, which he analyzed to determine the adjusted per-acre value of raw land and then wrote these figures on maps of areas of St. Thomas known as value maps. The Tax Assessor repeatedly failed to produce these "working" documents during pre-trial and in-trial discovery, despite being ordered to do so a number of times. Ultimately, the Tax Assessor admitted that those documents could not be found. This unreliability is exacerbated by Martin's use of a "hidden" and unreviewable modification factor to arrive at the land values of plaintiffs' properties.

The hidden multiplier seems to work as follows. The land values for plaintiffs' properties are determined by multiplying the Tax Assessor's per acre price by the acreage, multiplying the result by disclosed modification factors for acreage and topography, as appropriate, then multiplying this number by a hidden and undisclosed modifier that appears to be related to across the board increases to the land value tables buried in the bowels of the Tax Assessor's mass appraisal computer program. Martin acknowledged that the basis for the increases are not disclosed on any document available to the public at the Tax Assessor's office. (Martin Test., Tr. IV at 48-49.) Most important for the reliability of the assessment values produced by the Tax Assessor, however, is the lack of any relationship between these across-the-board increases to conditions in the marketplace between 1997 and 1999. (Jamron Test., Tr. V at 92-93.) To cap it off, Martin could not explain how he arrived at his across-the-board increases because he could not locate notes he said would

indicate how he arrived at those increases. (Martin Test., Tr. VI at 133-134, 139-140, 182.)[22]

I find Martin's unreliable and overstated building costs, his unreasonable and erratic depreciation schedules, his unreliable and unverifiable land values, as confirmed by the ratio studies, to be powerful and convincing evidence that the Tax Assessor's office systematically employs a method of assessment not calculated to determine the actual value of real property.

VI. THE REMEDIES

A. Plaintiffs' Are Entitled to a Permanent Injunction

1. Equitable relief under 42 U.S.C. § 1983

I have already found that the plaintiffs proved their claim that Martin violated their civil rights by systematically employing a method of assessment not calculated to determine the actual value of their properties.[23] Plaintiffs thus have clearly prevailed on the merits, and two of the other three factors for permanent injunctive relief favor plaintiffs and are easily resolved, namely, the public interest and the balance of the respective harms. The public interest undeniably weighs in favor of a mandate

[22] Martin also applied an additional ten percent increase in commercial land values for tax year 1999, (Martin Test., Tr. III at 47-48, 57, 62-63), which he discussed on a talk-radio program on July 25, 2000, (Runyon Test., Tr. II at 6-8.)

[23] Plaintiffs having prevailed on their statutory § 1983 claims against Martin, it is unnecessary to address their constitutional § 1983 claims based on the Equal Protection Clause of the Fourteenth Amendment.

ordering the executive arm of the Virgin Islands Government to comply with federal law and enjoining it permanently from violating that federal law. *See St. John-St. Thomas Hotel & Tourism Ass'n, Inc. v. Government of the Virgin Islands,* 41 V.I. 317, *rev'd on other grounds,* 218 F.3d 232 (3d Cir.2000). The mere statement of the competing harms resolves the third factor in plaintiffs' favor – the injury to plaintiffs of allowing Martin to continue the illegal property assessments versus the harm to the Government of stopping those illegal assessments.

Moreover, the facts of this case compel that I discount any harm the defendants may claim an injunction will cause because the defendants' own recalcitrance will have caused that "injury". *See Opticians Ass'n v. Independent Opticians,* 920 F.2d 187, 197 (3d Cir.1990) ("By virtue of this recalcitrant behavior, the [party opposing the injunction] can hardly claim to be harmed, since it brought any and all difficulties occasioned by the issuance of an injunction upon itself.").[24] After agreeing to bring the property assessment procedure and practice into compliance with federal law via the *Berne* Settlement of December 19, 2000, the defendants first delayed that process for two years and then had Martin testify that the agreement did not require them to modify their practices and procedures

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[24] *See also Norvatis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharm. Co.,* 290 F.3d 578, 596 (3d Cir.2002) (noting that whatever harm an injunction would cause "may be discounted by the fact that the defendant brought that injury upon itself."); *Pappan Enters., Inc. v. Hardee's Food Sys., Inc.,* 143 F.3d 800, 806 (3d Cir.1998) ("The self-inflicted nature of any harm suffered by [the party opposing the injunction] also weighs in favor of granting preliminary injunctive relief.").

or to conform to USPAP. (Martin Test., Tr. II at 82.) Consequently, any harm defendants may suffer as a result of the injunction must be discounted by the fact that defendants have been given, and declined to take, every opportunity to fix the numerous problems at the Office of the Tax Assessor without a court injunction.

Only the inadequacy of plaintiffs remedy at law requires some discussion. First, the Court of Appeals has ruled that a party need not show inadequacy of legal remedy, including irreparable harm, where the harm is the violation of a statute. *See Government of the Virgin Islands v. Virgin Islands Paving, Inc.*, 714 F.2d 283, 286 (3d Cir.1983). A finding that a violation will harm the public is implicit in the history that 48 U.S.C. § 1401a was enacted to replace a territorial property tax system that was stifling economic growth. Accordingly, the plaintiffs need only show a violation of section 1401a, as they have done, to be entitled to equitable relief under section 1983 without any specific showing of irreparable harm. *See id.; see also Ciba-Geigy Corp. v. Bolar Pharm. Co.*, 747 F.2d 844, 850 (3d Cir.1984) (describing requirements for permanent injunction and omitting irreparable harm); *Southeastern Pa. Transp. Auth. v. Pennsylvania Pub. Util. Comm'n*, 210 F.Supp.2d 689, 726 (E.D.Pa.2002) (finding "convincing the logic of the cases applying a relaxed standard for issuing injunctions upon a showing of statutory violations"); *ReMed Recovery Care Ctrs. v. Township of Willistown*, 36 F.Supp.2d 676, 688 (E.D.Pa.1999) (applying relaxed irreparable harm standard).[25] Second, virtually by

[25] Later panel decisions, which of course cannot overrule the earlier panel in *Virgin Islands Paving*, would seem to require a showing of

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definition, money damages are not an adequate remedy because they are not available in a 1983 suit against the Territory or one of its officers acting in his official capacity.

If I need to look further, plaintiffs have otherwise shown the inadequacy of their legal remedy necessary for permanent injunctive relief. *See Temple Univ. v. White,* 941 F.2d 201, 215 (3d Cir.1991); 11A WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 2944 (2002) (To obtain a permanent injunction, a showing of irreparable injury in the sense of inadequacy of monetary damages "is not an independent requirement for obtaining a permanent injunction; it is only one basis for showing the inadequacy of the legal remedy."). I find that no remedy at law would be adequate to redress this "continuing cycle of litigation and/or continuing [unlawful] assessments." *See Southeastern Pa. Transp. Auth.,* 210 F.Supp.2d at 726 ("the focus of the irreparable harm inquiry is whether . . . an adequate remedy at law" is available); *Louis W. Epstein Family P'ship v. K-mart Corp.,* 828 F.Supp. 328, 338-39 (E.D.Pa.1993) (stating that there is "no adequate remedy at law if the injury is of a repeated or continuing character"), *aff'd in part and rev'd in part,* 13 F.3d 762 (3d Cir.1994); *Northeast Women's Ctr., Inc. v. McMonagle,* 665 F.Supp. 1147 (E.D.Pa.1987) (noting that irreparable harm is a component of adequacy of the legal remedy and

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irreparable harm. *See, e.g., Natural Res. Def. Counsel v. Texaco Ref. & Mktg., Inc.,* 906 F.2d 934, 941 (3d Cir.1990) and *Rosa v. Resolution Trust Corp.,* 938 F.2d 383, 400 (3d Cir.1991). Although a later panel has recognized this dichotomy, *see Temple Univ. v. White,* 941 F.2d 201, 215 (3d Cir.1991), *Virgin Islands Paving* remains good law as it has not been overruled by the Court of Appeals for the Third Circuit sitting *en banc.*

stating "the legal remedy is inadequate if the plaintiff's injury is a continuing one, where the best available remedy would relegate the plaintiff to filing a separate claim for damages each time it is injured anew"), *aff'd in part and remanded,* 868 F.2d 1342 (3d Cir.1987).[26] I also find that plaintiffs will suffer a continuing harm absent an injunction because the Tax Assessor will not even acknowledge that his present system of assessment does not produce credible and reliable appraisals of the actual value of real property. Without an injunction, Martin will continue to illegally assess plaintiffs' properties and the Government will continue to send out excessive and unreliable bills based on those illegal assessments, requiring plaintiffs to file new suits to vindicate their federal right.

Moreover, the administrative remedy the Government purports to provide via the Board of Tax Review is no

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[26] *See also Guzman v. Bavona,* 90 F.3d 641, 650 (2d Cir.1996) (stating that "a district court has broad discretion to enjoin possible future violations of law where past violations have been shown."); *New York State Nat'l Org. for Women v. Terry,* 886 F.2d 1339, 1362 (2d Cir.1989) (affirming, in part, injunction prohibiting blocking of clinic because "the harm will be of a continuing nature absent an injunction"); *Martin v. Shell Oil Co.,* 180 F.Supp.2d 313, 323 (D.Conn.2002) (harm of a continuing nature can constitute irreparable injury justifying permanent injunction); *Galella v. Onassis,* 353 F.Supp. 196, 235 (S.D.N.Y.1972), *aff'd in part and rev'd in part,* 487 F.2d 986 (2d Cir.1973) (no adequate remedy at law because of "the recurrent nature of plaintiff's invasions of defendant's rights [and] the need for a multiplicity of damage actions to assert defendant's rights"); *Local Union 499 v. Iowa Power & Light Co.,* 224 F.Supp. 731, 738 (S.D.Iowa 1964) (finding irreparable harm because "where there is a likelihood of such recurring and constant injury, damages may not be an adequate remedy").

remedy at all due to the Board's excessive delays, as this Court has consistently held and holds again here. *See, e.g., Anchorage Assoc. v. Virgin Island Bd. of Tax Review,* Civ. No.1984-287, 1991 U.S. Dist. LEXIS 20005, at (D.V.I. Feb. 6, 1991). In the twelve years since the *Anchorage* decision, the Board's effectiveness has not improved. I will not repeat the long history of cases detailing the Board's ever increasing ineffectiveness, as it is set forth in *Berne Corporation v. Government of the Virgin Islands,* 2000 WL 1689787 (D.Vi.2000) and *Equivest St. Thomas, Inc. v. Government of the Virgin Islands,* 208 F.Supp.2d 545 (D.Vi.2002). In sum, an appeal to the Tax Review Board is not only a non-exclusive option available to an aggrieved taxpayer, it is also a futile option that does not constitute an adequate remedy at law because the Tax Review Board has consistently demonstrated it is incapable of timely resolving tax appeals.

It is clear, therefore, that plaintiffs have satisfied all the prerequisites for equitable relief and are entitled to an injunction under section 1983 to prohibit Martin, acting in his official capacity as Tax Assessor, from continuing to deprive plaintiffs of their federal statutory right to have their property assessed at its actual value per 48 U.S.C. § 1401a.

2. Equitable Relief under 5 V.I.C. § 80

To reiterate, 5 V.I.C. § 80 gives a taxpayer the right to bring "an action to restrain illegal or unauthorized acts by a territorial officer or employee, or the wrongful disbursement of territorial funds." In plaintiffs' taxpayer suit on behalf of all payers of real property taxes, they seek to restrain Martin from assessing real property in the Virgin

Islands and the Government from requiring payment of real property taxes until (1) such taxes and assessments are redetermined based on the actual value of each property, as required by 48 U.S.C. § 1401a and (2) the Board of Tax Review consistently holds hearings and decides appeals within the time presently required by 33 V.I.C. § 2452, and the Government, through its Commissioner of Finance, consistently remits all refunds resulting from Board decisions within the time presently required by section 2451(a).

To bring an action under section 80, all the plaintiffs must establish is that they pay Virgin Islands taxes. The statute imposes no minimum threshold on the amount of taxes paid, no requirement that plaintiffs suffer any special damages other than those suffered by all similarly situated taxpayers, no requirement that the allegedly illegal act the taxpayers seek to restrain involves property to which their tax payments have contributed, and no requirement that the illegal acts have to do with public funds or public property. I draw these conclusions from a section 80 taxpayer suit in this Court that similarly involved real property and challenged the validity of a local statute as violating a federal statute. The Government sold a piece of property pursuant to special local legislation that directed the Commissioner of Property and Procurement to sell the property to a specific private individual. Taxpayers brought suit in this Court under 5 V.I.C. § 80 on behalf of themselves and other Virgin Islands taxpayers against the Government, the Commissioner, and the purchaser to declare the sale illegal and void and for injunctive relief.

This Court initially agreed with the Government that the taxpayers lacked the capacity to sue under section 80

and dismissed the complaint. The Court of Appeals reversed and remanded for a trial on the merits, holding that

> the alleged minuteness of the amount of the present taxpayers' interests may not be urged as a ground for denying them standing to sue. For the statute does not impose upon them any requirement as to the minimum amount of their taxes, either in absolute terms or in relation to the amount of funds or property involved in the suit. It merely requires a showing that they are territorial taxpayers. Having made such a showing the plaintiffs are entitled under the statute to sue to restrain illegal or unauthorized acts by a territorial officer or employee. . . . Moreover the statute does not require that the alleged illegal act which is sought to be restrained involves public funds or property to which the plaintiffs' tax payments have contributed, or even that the alleged illegal act involves the public funds or property at all. For us to hold otherwise would be to put an unwarranted gloss upon the statute and to defeat pro tanto its salutary purpose.

Smith v. Government of the Virgin Islands, 329 F.2d 131, 134 (3d Cir.1964). This salutary purpose of section 80 is that "of enabling taxpayers to obtain the aid of the district court to restrain any illegal acts of territorial authorities. . . . Such suits . . . serve a very useful public purpose in keeping within legal bounds the actions of government officers. . . . " *Id.* at 133. The Court of Appeals specifically rejected the suggestion that the plaintiff in a section 80 suit must show some special damage to herself that was different in character from that suffered by the general body of taxpayers, for "the Virgin Islands statute imposes no such requirement." *Id.* at 134.

After a bench trial on remand, this Court found the local special legislation disposing of government property to a specific private person violated a federal statute, 48 U.S.C. § 1471. Section 1471 provided that "the legislatures of the Territories of the United States now or hereafter to be organized shall not pass local or special laws . . . granting to any . . . individual any special or exclusive privilege, immunity, or franchise whatever." Without applying or even mentioning the usual factors needed for equitable relief, this Court voided the statute and rescinded the sale. See *Smith v. Government of the Virgin Islands,* 240 F.Supp. 809, 810-11 (D.Vi.1965).

On the second appeal, this time by the Government, the Court of Appeals reiterated that 5 V.I.C. § 80 imposes

> no requirement that a taxpayer must show his liability for any minimum amount of taxes either in absolute terms or in relation to the amount of the property involved in the suit, or to show any special damage to himself different in character from that suffered by the general body of taxpayers.

Smith v. Government of the Virgin Islands, 375 F.2d 714, 715-16 (3d Cir.1967). The Court of Appeals then affirmed this Court, finding that 48 U.S.C. § 1471 applied to the Territory of the Virgin Islands and that the local act

> singled out [one person] from all other citizens and discriminated against them by granting to him an exclusive privilege to acquire the parcel of land. This arbitrary action violated the specific prohibition of 1471 against the passage of a special law "granting to any . . . individual any special or exclusive privilege . . . whatever."

Id. at 717. The Court of Appeals did not require or even mention the need to assess the public interest, to balance the respective harms, or to determine the inadequacy of a plaintiff's legal remedy before granting injunctive relief under 5 V.I.C. § 80.

Regarding plaintiffs' claim against the Board of Tax Review, I note that the Virgin Islands is within its rights to require a property owner first to pay the tax and then to apply to an administrative agency for a refund. When it does so, however, the administrative process must provide an adequate remedy and if it does not, then the Territory's legal compulsion to first pay the tax denies the taxpayer the due process of law. *See Reich v. Collins,* 513 U.S. 106, 115 S.Ct. 547, 130 L.Ed.2d 454 (1994) (stating that, "[d]ue process requires a 'clear and certain' remedy for taxes collected in violation of federal law"). The Virgin Islands Code provides that "any person aggrieved by the action of the assessor in relation to the value of his property *may* make written complaint thereof to the Board of Tax Review," *see* 33 V.I.C. § 2451(a) (emphasis added),[27] as long as he also "pay[s] an amount equal to the full amount of the assessment [sic] for the tax year previous to that . . .

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[27] I rejected defendants' claim that Equivest had not exhausted its administrative remedies by failing to first appeal to the Board of Tax Review based on the statute's use of the word "may." Section 2451(a) thus does not require the taxpayer to exhaust this administrative remedy before bringing a taxpayer suit under 5 V.I.C. § 80, especially since the courts of the Virgin Islands are fully operational while the Tax Review Board is ineffective. *See Equivest, St. Thomas,* 208 F.Supp.2d 545, 549 n. 7. My ruling the plaintiffs did not have to exhaust their administrative remedies was upheld by the Court of Appeals. *See Bluebeard's Castle,* 321 F.3d at 397 n. 4.

being appealed."[28] 33 V.I.C. § 2451(b). The Board is required to hold a hearing and reach a determination on an appeal within sixty days from the date the appeal is filed. *See id.* at § 2452. If the taxpayer wins the appeal, "the Commissioner of Finance shall refund any excess taxes paid within 30 days of the judgment of the Board of Tax Review." *Id.* [29]

By the Board's own admission, this does not occur. Notwithstanding the fact that anywhere from 500 to 1000 tax appeals are filed annually, the Board has met only *twenty-one times over the past five years,* and has had a quorum of board members present only for approximately half of those meetings. (Turnbull Test., Tr. IV at 156.) Based on these numbers, the Board would need to resolve hundreds of appeals each time it meets, a level of productivity it has never approached. Indeed, the Board takes up to seven years, and usually from three to five years, to schedule a hearing on an appeal. Even when and if the Board makes a determination that results in a refund to the taxpayer, the Department of Finance does not pay the taxpayer within thirty days of the Board's decision, as required by 33 V.I.C. § 2451(b).

Although I believe a taxpayer suit to restrain illegal governmental activity under section 80 requires no more

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[28] I am sure the Legislature intended to require full payment of the current tax bill, not the assessment, inasmuch as the "assessed value shall be the actual value of such property" and the tax to be "levied and collected" is 1.25% of 60% of "such assessed value." *See* 33 V.I.C. § 2301(a).

[29] Similarly, if the taxpayer loses, she must pay any balance due within thirty days. 33 V.I.C. § 2451(b).

that the payment of taxes and proof of the illegality, plaintiffs clearly have satisfied the customary four prongs required for equitable relief. I incorporate my findings from the preceding section and here find that the inability of the defendants to compensate the plaintiffs with money damages also satisfies the irreparable injury prong. As an element of irreparable harm, I look to the financial strength of the Government to determine whether or not the defendants would be able to compensate the plaintiffs with money damages. *See West Indian Co. v. Government of the Virgin Islands,* 643 F.Supp. 869 (D.Vi.1986) (citing *Eli Lilly & Co. v. Premo Pharm. Labs,* 630 F.2d 120, 137 (3d Cir.1980)). I have no difficulty finding that it is more likely than not that the Government of the Virgin Islands will not be able to pay damages, for the Governor himself has admitted as much. In a statement issued a few days after he granted paid leave to "nonessential" employees to attend the main Carnival events on St. Thomas during the last week of April,[30] Governor Turnbull confessed that if monthly expenditures continue to exceed revenues, "this government will face deferred paydays and ultimately insolvency because the projected deficit for 2003 exceeds $115 million. If we continue at this rate, the government will not have sufficient cash in the month of June to meet all of its necessary obligations." Marty Schladen, *$115 Million Deficit: V.I. on the Brink of Bankruptcy,* VIRGIN ISLANDS DAILY NEWS (Apr. 25, 2003). The Governor's admission thus amply corroborates the testimony at trial of the Commissioner of Finance, Bernice Turnbull, that

[30] *See* Marty Schladen, *Turnbull Gives Many V.I. Workers Paid Leave for Carnival,* VIRGIN ISLANDS DAILY NEWS (Apr. 24, 2003).

the government experienced "a serious cash position" in December. (Turnbull Test., Tr. IV at 119.) The Commissioner similarly testified before the Committee of the Whole of the Virgin Islands Legislature on January 28, 2003 to the precarious nature of the Government's cash flow: as of that morning, the total cash was $18.7 Million and the government payroll was $14.2 million every two weeks. Likewise, in a case in which the United States has been attempting to force the Government of the Virgin Islands to comply with a consent decree it willingly executed in 1985, the Government has been unable to comply with my order of December 19, 2001, to deposit a mere $5 million into the St. Croix sewage corrective action fund. *See United States v. Government of the Virgin Islands,* Civ. No.1984-104, 2001 WL 1727256 (D.Vi. Dec.19, 2001).

I also take judicial notice of recent media reports that confirm the depth of the financial crisis and rebut Commissioner Turnbull's attempt to suggest at trial that the Government's finances were fine and the problem was only temporary. *See* Marty Schladen and Nancy Cole, *Projected FY 2003 Deficit Worse Than What Turnbull Inherited,* VIRGIN ISLANDS DAILY NEWS (Apr. 28, 2003); Aril Bruce, *VI in 'Financial Crisis' . . . Once More,* AVIS (Apr. 27-28, 2003); Chris Larson, *V.I. Fiscal Crisis: Strategies and Strife,* VIRGIN ISLANDS DAILY NEWS (Apr. 26, 2003); *Chronology of a Crisis: Events leading V.I. to the Brink of Bankruptcy,* VIRGIN ISLANDS DAILY NEWS (Apr. 26, 2003); Molly Morris, *Cash Flow Problem is a 'Fiscal Crisis' After all,* ST. THOMAS SOURCE (Apr. 26, 2003), *at* www.onepaper.com/stthomasvi; Dan Kuemmel, *SOS – Government a Sinking Ship,* AVIS (Apr. 25, 2003); Marty Schladen, *$115 Million Deficit: V.I. on the Brink of Bankruptcy,* VIRGIN ISLANDS DAILY NEWS (Apr. 25,

2003); Valerie Lovett, *V.I. Facing $100M Deficit for FY 2003, Turnbull Says,* ST. THOMAS SOURCE (Apr. 25, 2003), *at* www.onepaper.com/stthomasvi; Valerie Lovett, *Minority, Majority Spar over 'Fiscal Crisis',* ST. THOMAS SOURCE (Apr. 3, 2003), *at* www.onepaper.com/stthomasvi; Joy Blackburn & Chris Larson, *Finance Authority Advances Government $7 million to Cover its Operating Costs,* VIRGIN ISLANDS DAILY NEWS (Mar. 28, 2003); Jean P. Greaux, Jr., *Austerity Measures May Delay Full-Blown Crisis,* ST. THOMAS SOURCE (Mar. 28, 2003), *at* www.onepaper.com/stthomasvi; Chris Larson, *Senators Hear VI Payroll is in Peril,* VIRGIN ISLANDS DAILY NEWS (Jan. 29, 2003) (noting that several government officials referred to a "current cash crunch" and "cash-flow crisis" and noting the statement of Louis Willis, Director of Bureau of Internal Revenue: "I don't know how we are keeping afloat, but we are"); Molly Morris, *It's 'Day-to-Day' Financing Now,* ST. THOMAS SOURCE (Jan. 28, 2003) (same), at www.onepaper.com/stthomasvi.

Unquestionably, all of the plaintiffs are Virgin Islands taxpayers who have sued on behalf of themselves and all other similarly situated Virgin Islands property taxpayers. Consequently, I find that plaintiffs are qualified to sue the Tax Assessor and the Government, including the Board of Tax Review. I find further that plaintiffs' have established their right and the right of all property owners in the Virgin Islands to a decree restraining the Tax Assessor from assessing real property in the Virgin Islands and the Government from requiring payment of real property taxes, beginning with tax year 1999, *until* such taxes are based on a system of assessment that reliably and credibly assesses real property in the Virgin Islands at its actual value *and* the Board of Tax Review and the Department of

Finance consistently afford property taxpayers a constitutionally adequate administrative review and remedial process under local law.

3. Scope of Permanent Injunction

The plaintiffs having established their entitlement to injunctive relief, I will issue a permanent injunction against Roy Martin, in his official capacity as the Tax Assessor for the Government of the Virgin Islands, pursuant to 42 U.S.C. § 1983, enjoining Martin from assessing any of the named plaintiff's real properties until he establishes a reliable and credible system that will appraise real property consistently at its actual, market value in compliance with 48 U.S.C. § 1401a. Under this Court's supplemental jurisdiction pursuant to 5 V.I.C. § 80 to restrain illegal and unauthorized acts of territorial officers and employees, I will similarly enjoin Roy Martin, in his official capacity as the Tax Assessor, from such illegal assessments, and I will also enjoin the Government of the Virgin Islands, and any of its departments, agencies, and employees, from issuing any tax bills until there is in place an assessment system that will reliably and credibly appraise real property at its actual, market value *and* from seeking to collect any property tax bills issued on commercial property as of tax year 1999.[31] Thus, the Government will be enjoined from further implementing the recently passed Act No. 6574. As presently written, Act 6574 is void as requiring commercial property owners to

[31] I find that the appropriate cut-off date is tax year 1999 as it was the first year challenged in *Berne*.

pay bills for tax years 2001, 2002, 2003, and 2004 based on the illegal assessment made in the year 1999. Because the 1999 property tax bills are illegal, being produced by an assessment system that violates federal law, the 1999 bills cannot form the basis for payment of property taxes for later years, unless the Legislature further amends 33 V.I.C. § 2402 to provide for retroactive adjustment of the bills for 1999, 2000, 2001, 2002, 2003, and 2004, once a fair and equitable system capable of consistently assessing their properties at their actual values is in place.[32] The provision for retroactive adjustment would have to cover both overpayments, which could be credited against future property taxes, and underpayments, for which the taxpayer would be billed retroactively.

The section 80 injunction retraining the Government from issuing any further tax bill and from seeking to collect any existing tax bills beginning with tax year 1999, as well as enjoining the Tax Assessor from any further illegal assessments extends to all real property owners and real property in the Virgin Islands, including vacant land, agricultural land, commercial properties, residential properties, condominiums, and timeshare units, because plaintiffs cover the complete spectrum of taxpaying real

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[32] The Legislature handled the aftermath of Hurricane Marilyn by allowing retroactive credit for 1994 taxes. *See* Act Aug. 29, 1995, No. 6078, § 4, Sess. L.1995, p. 203 ("Notwithstanding any other provision of law to the contrary, all property taxpayers who have paid their 1994 residential property tax bills prior to the enactment of this act, shall, be entitled to have a credit applied to their subsequent year's tax bill for any excess which may have accrued as a result of the payment of their 1994 residential property tax bill."). Under our system of property taxation, the 1994 bills were due no later than September of 1995, the month Hurricane Marilyn devastated the Islands.

property owners who complained that the Tax Assessor's method of assessment was not calculated to determine actual value.[33]

Finally, the injunction shall remain in place until the Board of Tax Review consistently holds hearings and reaches decisions on all appeals within the sixty days as presently required by 33 V.I.C. § 2452, and the Government, through its Commissioner of Finance, consistently remits any refunds resulting from the Board decision within thirty days of the Board's decision as presently required by 33 V.I.C. § 2451(a). The Legislature may wish to revisit the time periods for decision and payment and modify them to provide longer periods, as long as the revised time frame is reasonable.

B. The Berne Settlement Agreement Will Be Enforced

The parties negotiated a settlement of the *Berne* case, which was approved on December 19, 2000. The Government and the Tax Assessor agreed to bring the Virgin Islands real property tax system into compliance with the federal requirement that property be assessed on its actual value, which I have found to be the same as its market value. The parties agreed that the Tax Assessor would develop and implement "the procedures and process to be used by the Virgin Islands Tax Assessor's office in

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[33] It is possible that Act 6574 could be expanded to cover all property and property owners from 1999 through 2004 tax years. The provision for retroactive adjustment as outlined in the text could provide a basis for lifting this part of the injunction.

appraising commercial properties pursuant to a mass appraisal approach and Uniform Standards of Professional Appraisal Practice ("USPAP") Standards." The parties further agreed that the Court would appoint a mutually agreed upon special independent master who would review the process and, ultimately, certify the new procedures as proper and test them for compliance through a random sampling of ten percent (10%) of assessments to ensure that the new system produces credible and reliable fair market values. The project would take two years and the special master would report to the Court on compliance every 180 days. (*See* Ex. 10.)

In his initial report in January of 2002, Hunt described in detail his "extensive review of assessment procedures; mass appraisal methodologies; assessment system components (including data base records for court case properties), and the organizational approach for administering the assessment function" then in place at the Tax Assessor's Office. (Ex. J-2, Special Master's Report, Jan. 15, 2002, at 1.) He identified and discussed USPAP's seven steps of a mass appraisal system and described the current level of compliance by the Tax Assessor. Hunt presented his recommendations for bringing each step of the system up to an acceptable level of compliance and tax consultant Voss' plan in response to those recommendations. Although the consultant's plan was a good start on the planning phase of this project, it

> lacks the sufficient detail necessary to make manpower and cost estimates that are needed to seek funding for the project. Additional detail on order of events and work projects in the plan is also necessary to properly manage the project.

> The work plan should be expanded as soon as possible.

(*Id.* at 16.)

Hunt placed great emphasis on the importance of developing good valuation models for the cost approach, the sales comparison approach, and the income approach "that are capable of appraising the properties in the Virgin Islands and that will satisfy the accuracy and uniformity requirements of the mass appraisal."

> The models must be capable of explaining the relationship of "Actual Value" for a property and the property characteristics and market variables that represent factors of supply and demand. . . . The cost approach must be customized to the building types found in the Virgin Islands and have the capacity to adjust to the variety of interior finishes permitted by weather and climate conditions in the islands. Market adjustments that result from terrain, storm exposure, flood, etc. must be built into the models. An income approach for mass application and calibration techniques must be developed and local market income and expense variables be researched and maintained.

(*Id.* at 20.) He strongly recommended that Martin direct the consultant to expand his work Plan "to include greater detail on each project phase and to include time line, manpower requirements and cost estimates required to complete the project," with selecting the valuation methodology and valuation models a high priority because "so much of the remaining project is dependant on this decision." (*Id.* at 20-21.)

Unfortunately, very few if any of these recommendations had been accomplished by Hunt's next report on July 24, 2002:

> Progress to date on the reappraisal of all commercial property in the Virgin Islands has been sporadic, piecemeal, and is not following an orderly planning and implementation process consistent with accepted mass appraisal techniques. Much of the work accomplished may be useful in the final analysis; however, to continue with the disorganized approach demonstrated at this point will very likely result in an inferior final product, and getting locked into decisions that would not be the first choice if a more orderly process was followed.
>
> The current level of staffing in the normal workloads in the Assessor's office does not permit consistent activity on the reappraisal project with the current staffing levels. A considerable amount of the valuation consultant's time has been necessarily directed to the large property tax appeal activity that has occurred since the settlement agreement that directed this reappraisal activity. It is my observation that the necessary funding to go forward with the reappraisal project, in a timely manner, has not been forthcoming.

(Ex. J-3, Special Master's Report, July 24, 2002, at 10.)

Voss' letter to Hunt of October 2, 2002, confirmed this last paragraph that the reappraisal project and thus the *Berne* Settlement had been stymied by lack of funding by the Legislature and that much of Voss' time was consumed by this litigation. (Ex. J-12, Voss letter, Oct. 3, 2002.) Voss reported that the Finance Committee of the Legislature

had removed his budget for the reappraisal project, although Martin "indicated the money has been set aside." There was no confirmation presented by the defendants at trial that funding was in place or whether Voss was continuing to act as consultant to the Tax Assessor. Martin's representation that Hunt presently is "waiting for the revised work plan from the consultant that is working for the government in the Office of the Tax Assessor," (Martin Test., Tr. II at 50), was flatly contradicted by the statement of defendants' counsel that Voss is off the job due to a breakdown in his relationship with Government, (Tr. II at 218.). From my observation over the years, such breakdowns usually stem from the Government's failure to meet its financial obligations.

Defendants seem to contend that all of USPAP is inapplicable to the Tax Assessor because of its "Jurisdictional Exception Rule" included in the *Berne* Settlement. This rule would merely serve to sever and save the rest of Standard 6 of USPAP on mass appraisal if one of its parts is contrary to the law or public policy of the Virgin Islands. Thus, at best, the jurisdictional exception rule could only apply to section 2404(b)'s limitation on use of the income capitalization approach for assessment of commercial property that renders it inconsistent with USPAP, leaving all the rest of Standard 6 intact. (*See* Hunt Test., Tr. I at 131-132.) Inasmuch as I have ruled that section 2404(b) violates 48 U.S.C. § 1401a and is void and of no effect, there is no basis upon which the defendants may invoke application of the jurisdictional exception rule.

As is evident from broad language of the *Berne* Settlement itself, the improvements it requires the Tax Assessor to make to the mass appraisal system are intended to benefit all commercial property owners as

intended third-party beneficiaries of the *Berne* Settlement. By judicial admission the defendants have extended the benefits of the *Berne* Settlement to all real property owners in the Virgin Islands, including owners of residential and agricultural property, as noted above in section IV.C.

I find that defendants have materially breached the *Berne* Settlement by failing to fund the reappraisal project adequately, by failing to adopt the recommendations of the special master, and by otherwise failing to correct the mass appraisal practice and procedure that would enable Hunt to certify such procedures to be proper and to verify through random sampling that the corrected mass appraisal computer program produces actual value assessments. I will order the *Berne* Settlement to be specifically performed by defendants to ensure that all real property in the Virgin Islands subject to property tax is appraised, assessed and taxed at actual, market values in accordance with 48 U.S.C. § 1401a and the Uniform Standards of Professional Appraisal Practice. I also will extend the term of the [sic] Joseph Hunt as special master, at defendants' expense, until such time as he submits, and the Court approves, his final report certifying that the procedures used by the Office of the Tax Assessor are proper and generate credible and reliable assessments of actual/market values.

To ensure sufficient funding I will order the opening of a separate bank account, titled "The Actual Value Property Tax Assessment Fund," to be used exclusively for the implementation of the *Berne* Settlement. Initially, the bank account shall be funded from the reasonable estimates of the property taxes the plaintiffs will otherwise pay to the Department of Finance, which will be credited

against their property tax obligations as finally redetermined once the property tax assessment system satisfies federal law.

DECREE

Having considered the entire record in this matter, including the testimony and documentary evidence presented at the trial on January 6-10, 21, and 22, 2003, and based on the Memorandum of even date, it is hereby,

1. DECREED that Roy Martin, in his official capacity as Tax Assessor of the Virgin Islands, and thereby the Government of the Virgin Islands are permanently enjoined pursuant to 42 U.S.C. § 1983 from violating plaintiffs' federal right under 48 U.S.C. § 1401a to have their real property assessed at its actual value, and, it is further

2. DECREED that Roy Martin, in his official capacity as Tax Assessor of the Virgin Islands, and the Government of the Virgin Islands are restrained pursuant to 5 V.I.C. § 80 from continuing to commit the illegal and unauthorized acts of assessing any and all real property in the Virgin Islands, UNTIL the property tax system has been certified as reliably and credibly assessing and taxing all real property on its actual value AND UNTIL the Board of Tax Review consistently holds hearings and reaches determinations on appeals within the sixty (60) days required by 33 V.I.C. § 2452, and the Department of Finance consistently remits any refunds awarded by the Board decision within the thirty (30) days required by 33 V.I.C. § 2451(a), and it is further

3. DECREED that Act No. 6574 is void and of no effect and that, effective immediately, the Government, shall make no further effort to collect any tax bills already issued for any property, commercial or otherwise, for tax years 1999, 2000, and 2001, NOR SHALL the Government issue any property tax bills for tax year 2002 and beyond, for any property, commercial or otherwise, UNLESS, AND UNTIL, the Legislature amends 33 V.I.C. § 2402 to provide for retroactive adjustment of the bills on all classes of property for 1999, 2000, 2001, 2002, 2003, 2004, and for a reasonable time thereafter until a fair and equitable system capable of reliably and credibly assessing all real property at actual value is in place, and it is further

4. DECREED that the Government of the Virgin Islands and Roy Martin, in his official capacity as Tax Assessor of the Virgin Islands, shall fully, promptly, and diligently comply with all the conditions and perform all the terms of the settlement agreement entered into with the plaintiffs in *Berne Corp. v. Government of the Virgin Islands,* Civil 2000-141, and 21 *Queens Quarter v. Government of the Virgin Islands,* Civil No.2000-167 ["*Berne* Settlement Agreement"].

The Court further enters the following Orders to implement the foregoing injunctive relief:

1. As part of the enforcement of the *Berne* Settlement Agreement, the Government shall renew, extend and continue the appointment of Mr. Joseph Hunt to oversee implementation of the *Berne* Settlement Agreement, provided that Mr. Hunt consents to said extended appointment. Mr. Hunt shall continue to report to the Court on the

progress therewith on a biannual basis until further order of the Court.

2. The Government of the Virgin Islands and the Tax Assessor are herewith directed to make available to Mr. Hunt and agents any and all documents and records as Mr. Hunt may deem reasonably necessary to complete the obligations of his extended appointment.

3. All expenses associated with the extended retention of Mr. Hunt shall be the sole and exclusive obligation of the Government of the Virgin Islands and Roy Martin, in his official capacity. Mr. Hunt is herewith authorized to retain such additional persons and expend such additional sums as he reasonably believes are necessary to fully implement the *Berne* Settlement Agreement. All expenses associated therewith incurred by Mr. Hunt shall be the sole and exclusive obligation of the Government of the Virgin Islands.

4. Given the recalcitrance of the Government, including the Legislature, in adequately funding the *Berne* Settlement Agreement, a special fund titled "The Actual Value Property Tax Assessment Fund" ["the Fund"] shall be established by the Commissioner of Finance in a separate interest bearing bank account at a bank authorized to do business in the Territory of the Virgin Islands. The Fund and its bank account shall be funded from the property tax payments the plaintiffs to this litigation would otherwise pay to the Department of Finance, and their payments into the Fund will go toward satisfaction of their property tax obligations as finally redetermined once the property tax assessment system satisfies federal law. If additional monies are needed to fund the implementation of the

Berne Settlement Agreement, the Government shall ensure that all such additional funds are made available and deposited into the Fund. All monies in the Fund shall be used solely and exclusively for the implementation of the *Berne* Settlement. If, after the completion of the *Berne* Settlement, there are monies remaining in the Fund, such monies shall be used solely and exclusively to maintain the real property tax assessment system in compliance with the Uniform Standards of Professional Appraisal Practice ["USPAP"].

A. Mr. Hunt, in consultation with the Tax Assessor and any other consultants he deems appropriate, shall prepare an overall budget for however long it will take to staff, equip, complete and implement the *Berne* Settlement Agreement and submit it to the parties for review and then to the Court for approval.

B. The plaintiffs shall make good-faith estimates of the property taxes they owe and submit them to the Tax Assessor. If the parties cannot reasonably agree, they shall submit their figures to the Court for final decision.

C. Mr. Hunt, the Commissioner of Finance, and the Attorney General, shall confer and devise a mutually acceptable procedure for submitting, approving and timely paying all invoices and costs associated with implementing the *Berne* Settlement out of the Fund.

D. Mr. Hunt, the Attorney General or his representative, the Commissioner of Finance or her representative, and the plaintiffs shall report to the Court no later than May 28, 2003, on the progress they are making toward setting up and

funding the Fund and establishing the procedures for drawing checks on the Fund, and a status hearing will be held at 2:00 p.m. on Friday, May 30, 2003.

5. The Government may apply to the Court for an Order modifying or vacating any or all of these Orders at such time as the Government has adopted a system of property taxation that is compliant with 48 U.S.C. § 1401a, and with applicable portions of USPAP, and upon the written recommendation from the Special Master to that effect. This Court will review the report and recommendations of Mr. Hunt and will determine whether and when the defendants have completed the requirements of the *Berne* Settlement Agreement and brought the Virgin Islands property tax system into compliance with federal law (48 U.S.C. § 1401a) to assess all real property at its actual value, *i.e.*, fair market value.

6. Each Plaintiff in the consolidated cases is awarded costs of suit incurred thus far, including reasonable attorneys fees and costs, as shall be determined upon due application to this Court as each individual case is completed.

7. This Court retains jurisdiction to enforce the terms and conditions of the *Berne* Settlement Agreement, to enforce each of the Orders set forth herein, and to take any other action as might be appropriate to effectuate the Judgment entered herein.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 02-2807

BLUEBEARD'S CASTLE, INC.;
CASTLE ACQUISITIONS, INC.

v.

GOVERNMENT OF THE VIRGIN ISLANDS;
ROY MARTIN, in his official capacity as Tax Assessor,

Appellants

(D.C. Civ. No. 01-cv-00155)

SUR PETITION FOR REHEARING

Present: BECKER *Chief Judge*,
SLOVITER, SCIRICA, NYGAARD, ALITO, ROTH,
McKEE, RENDELL, BARRY, AMBRO, FUENTES
and SMITH, *Circuit Judges*

The petition for rehearing filed by appellants in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for

rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

/s/ [Illegible]
Circuit Judge

Dated: Mar. 26, 2003

48 U.S.C.A. § 1401. Equalization of taxes on real property; declaration of policy

It is the policy of Congress to equalize and more equitably to distribute existing taxes on real property in the Virgin Islands of the United States and to reduce the burden of taxation now imposed on land in productive use in such islands.

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48 U.S.C.A. § 1401a. Valuation of real property for assessment; uniformity of rates

For the calendar year 1936 and for all succeeding years all taxes on real property in the Virgin Islands shall be computed on the basis of the actual value of such property and the rate in each municipality of such islands shall be the same for all real property subject to taxation in such municipality whether or not such property is in cultivation and regardless of the use to which such property is put.

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48 U.S.C.A. § 1401b. Rate of tax in absence of local laws; regulations by President for assessment and collection pending adoption of local laws

Until local tax laws conforming to the requirements of sections 1401 to 1401e of this title are in effect in a municipality the tax on real property in such municipality for any calendar year shall be at the rate of 1.25 per centum of the assessed value. If the legislative authority of a municipality failed to enact laws for the levy, assessment, collection, or enforcement of any tax imposed under authority of said sections, within three months after May

26, 1936, the President shall prescribe regulations for the levy, assessment, collection, and enforcement of such tax, which shall be in effect until the legislative authority of such municipality shall make regulations for such purposes.

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48 U.S.C.A. § 1574. Legislative powers and activities

(a) Scope of authority; limitation on enactments and taxation

The legislative authority and power of the Virgin Islands shall extend to all rightful subjects of legislation not inconsistent with this chapter or the laws of the United States made applicable to the Virgin Islands, but no law shall be enacted which would impair rights existing or arising by virtue of any treaty or international agreement entered into by the United States, nor shall the lands or other property of nonresidents be taxed at a higher rate than the lands or other property of residents.

(b) Government bonds; maximum amount; sale, interest, etc.

(i) The legislature of the government of the Virgin Islands may cause to be issued on behalf of said government bonds or other obligations for a public improvement or public undertaking authorized by an act of the legislature. Such bonds or obligations shall be payable solely from the revenues directly derived from and attributable to such public improvement, public undertaking, or other project. Bonds issued pursuant to this paragraph (i) may bear such date or dates, may be in such denominations, may mature in such amounts and at such time or times,

not exceeding thirty years from the date thereof, may be payable at such place or places, may carry such registration privileges as to either principal and interest, or principal only, and may be executed by such officers and in such manner as shall be prescribed by the government of the Virgin Islands. Said bonds may be redeemable (either with or without premium) or nonredeemable. In case any of the officers whose signatures appear on the bonds or coupons shall cease to be such officers before delivery of such bonds, such signature, whether manual or facsimile shall, nevertheless, be valid and sufficient for all purposes, the same as if such officers had remained in office until such delviery. The bonds so issued shall bear interest at a rate not to exceed that specified by the legislature, payable semiannually. All such bonds issued by the government of the Virgin Islands or by its authority shall be exempt as to principal and interest from taxation by the Government of the United States, or by the government of the Virgin Islands, or by any State, Territory, or possession or by any political subdivision of any State, Territory or possession, or by the District of Columbia. Such bonds shall under no circumstances constitute a general obligation of the Virgin Islands or of the United States.

(ii)(A) Subject to the provisions of this paragraph (ii), the legislature of the government of the Virgin Islands may cause to be issued such negotiable general obligation bonds or other evidence of indebtedness, including but not limited to notes in anticipation of the collection of taxes or revenues, as it may deem necessary and advisable for any public puprpose authorized by the legislature: *Provided,* That no such indebtedness of the Virgin Islands shall be incurred in excess of 10 per centum of the aggregate assessed valuation of the taxable real property in the

Virgin Islands. Bonds issued pursuant to this paragraph (ii) shall bear such date or dates, may be in such denominations, may mature in such amounts and at such time or times, not exceeding thirty years from the date thereof, may be payable at such place or places, may be sold at either public or private sale, may be redeemable (either with or without premium) or nonredeemable, may carry such registration privileges as to either principal and interest, or principal only, and may be executed by such officers and in such manner, as shall be prescribed by the legislature of the government of the Virgin Islands. In case any of the officers whose signatures appear on the bonds or coupons shall cease to be such officers before delivery of such bonds, such signature, whether manual or facsimile, shall nevertheless be valid and sufficient for all purposes, the same as if such officers had remained in office until such delivery. The bonds so issued shall bear interest at a rate not to exceed that specified by the legislature. All bonds issued by the government of the Virgin Islands, including specifically interest thereon, shall be exempt from taxation by the Government of the United States, or by the government of the Virgin Islands or any political subdivision thereof, or by any State, territory, or possession or by any political subdivision of any State, territory, or possession, or by the District of Columbia.

(B) Bonds or other obligations issued pursuant to this paragraph (ii) shall not be a debt of the United States, nor shall the United States be liable thereon.

(iii)(A) The legislature of the government of the Virgin Islands may cause to be issued after September 30, 1984, industrial development bonds (within the meaning of section 103(b)(2) of Title 26).

(B) Except as provided in subparagraph (C), any obligation issued under subparagraph (A) and the income from such obligation shall be exempt from all State and local taxation in effect on or after October 1, 1984.

(C) Any obligation issued under subparagraph (A) shall not be exempt from State or local gift, estate, inheritance, legacy, succession, or other wealth transfer taxes.

(D) For purposes of this paragraph –

(I) The term "State" includes the District of Columbia.

(II) The taxes imposed by counties, municipalities, or any territory, dependency, or possession of the United States shall be treated as local taxes.

(E) For exclusion of interest for purposes of Federal income taxation, see section 103 of Title 26.

(c) Applicability of laws and ordinances; amendment or repeal

The laws of the United States applicable to the Virgin Islands on July 22, 1954, including laws made applicable to the Virgin Islands by or pursuant to the provisions of the Act of June 22, 1936 (49 Stat. 1807), and all local laws and ordinances in force in the Virgin Islands, or any part thereof, on July 22, 1954 shall, to the extent they are not inconsistent with this chapter, continue in force and effect until otherwise provided by the Congress: *Provided,* That the legislature shall have power, when within its jurisdiction and not inconsistent with the other provisions of this chapter, to amend, alter, modify, or repeal any local law or ordinance, public or private, civil or criminal, continued in force and effect by this chapter, except as herein otherwise

provided, and to enact new laws not inconsistent with any law of the United States applicable to the Virgin Islands, subject to the power of Congress to annul any such Act of the legislature.

(d), (e) Repealed. *Pub.L. 97-357, Title III, § 305,* Oct. 19, 1982, 96 Stat. 1709

(f) Customs duty; duty-free importation; effect on other customs laws

(1) The Legislature of the Virgin Islands may impose on the importation of any article into the Virgin Islands for consumption therein a customs duty. The rate of any customs duty imposed on any article under this subsection may not exceed –

(A) if an ad valorem rate, 6 per centum ad valorem; or

(B) if a specific rate or a combination ad valorem and specific rate, the equivalent or 6 per centum ad valorem.

(2) Nothing in this subsection shall prohibit the Legislature of the Virgin Islands from permitting the duty-free importation of any article.

(3) Nothing in this subsection shall be construed as empowering the Legislature of the Virgin Islands to repeal or amend any provision in law in effect on the date before October 15, 1977, which pertains to the customs valuation or customs classification of articles imported into the Virgin Islands.

---

48 U.S.C.A. § 1612. Jurisdiction of District Court

(a) Jurisdiction

The District Court of the Virgin Islands shall have the jurisdiction of a District Court of the United States, including, but not limited to, the diversity jurisdiction provided for in section 1332 of Title 28, and that of a bankruptcy court of the United States. The District Court of the Virgin Islands shall have exclusive jurisdiction over all criminal and civil proceedings in the Virgin Islands with respect to the income tax laws applicable to the Virgin Islands, regardless of the degree of the offense or of the amount involved, except the ancillary laws relating to the income tax enacted by the legislature of the Virgin Islands. Any act or failure to act with respect to the income tax laws applicable to the Virgin Islands which would constitute a criminal offense described in chapter 75 of subtitle F of Title 26 shall constitute an offense against the government of the Virgin Islands and may be prosecuted in the name of the government of the Virgin Islands by the appropriate officers thereof in the District Court of the Virgin Islands without the request or the consent of the United States attorney for the Virgin Islands, notwithstanding the provisions of section 1617 of this title.

(b) General jurisdiction; limitations

In addition to the jurisdiction described in subsection (a) the District Court of the Virgin Islands shall have general original jurisdiction in all causes in the Virgin Islands the jurisdiction over which is not then vested by local law in the local courts of the Virgin Islands: *Provided*, That the jurisdiction of the District Court of the Virgin Islands under this subsection shall not extend to civil actions wherein the matter in controversy does not

exceed the sum or value of $500, exclusive of interest and costs; to criminal cases wherein the maximum punishment which may be imposed does not exceed a fine of $100 or imprisonment for six months, or both; and to violations of local police and executive regulations. The courts established by local law shall have jurisdiction over the civil actions, criminal cases, and violations set forth in the preceding proviso. In causes brought in the district court solely on the basis of this subsection, the district court shall be considered a court established by local law for the purposes of determining the availability of indictment by grand jury or trial by jury.

(c) Criminal offenses; concurrent jurisdiction with local courts

The District Court of the Virgin Islands shall have concurrent jurisdiction with the courts of the Virgin Islands established by local law over those offenses against the criminal laws of the Virgin Islands, whether felonies or misdemeanors or both, which are of the same or similar character or part of, or based on, the same act or transaction or two or more acts or transactions connected together or constituting party of a common scheme or plan, if such act or transaction or acts or transactions also constitutes or constitute an offense or offenses against one or more of the statutes over which the District Court of the Virgin Islands has jurisdiction pursuant to subsections (a) and (b) of this section.

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42 U.S.C.A. § 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

JUL 17 2003

No. 02-1819

IN THE

Supreme Court of the United States

GOVERNMENT OF THE VIRGIN ISLANDS, *et al.*,

Petitioners,

v.

EQUIVEST ST. THOMAS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

The original Respondents, Bluebeard's Castle, Inc. and Castle Acquisitions, Inc., have been merged into Equivest St. Thomas, Inc. Equivest St. Thomas, Inc. is wholly owned by its ultimate parent company, Cendant Corporation, which is publicly traded.

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Respondent Equivest St. Thomas, Inc. ("Equivest") respectfully requests that this Court deny the petition for a writ of certiorari filed by the Government of the Virgin Islands (the "VI Government") and its Tax Assessor, Roy Martin ("Martin"). The petition requests that this Court grant a writ, vacate and remand the decision of the United States Court of Appeals for the Third Circuit, reported at 321 F.3d 394 (3rd Cir. 2003) (Pet. App. 1-16), which affirmed the district court's grant, in part, of a preliminary injunction to respondent and affirmed the denial of petitioners' motion to dismiss. The district court subsequently issued a permanent injunction, in favor of respondent and others, from which an appeal to the Third Circuit is pending, and the VI Government passed legislation with respect to the matter that permits collection of taxes pending further judicial proceedings.

STATEMENT OF THE CASE

This case involves the question whether the VI Government and Martin violated the rights of Equivest when they refused to assess taxes on Equivest's real property according to its "actual value" as required by 48 U.S.C. § 1401a. The district court preliminarily enjoined the VI Government and Martin from employing a certain tax assessment method, concluding that it violated federal law. The sole issues raised by the VI Government and Martin in their interlocutory appeal were: (1) whether the district court lacked federal subject matter jurisdiction; and (2) whether the district court abused its discretion in rejecting their unclean hands argument. They did not challenge the district court's ruling on the merits. They raised the private right of action issue, which is a subject of their petition here, only in their motion for rehearing *en banc*, and did not raise the Revised Organic Act of 1954 issue, the other subject of their

petition, at all. Concluding that Congress, acting within its Constitutional discretion, created a dual system of federal and territorial taxation in the Virgin Islands, and that Equivest's action was properly brought under the federal component of the tax system governed by 48 U.S.C. § 1401a, the court of appeals held that the district court had federal subject matter jurisdiction.[1] Accordingly, the court of appeals affirmed the preliminary injunction. It later denied rehearing or rehearing *en banc*. Pet. App. 126-27.

This case is related to several other Virgin Islands tax cases. These cases have been consolidated with this case and the district court has issued a permanent injunction barring the same conduct that is the subject of the preliminary injunction, thus supplanting that injunction. The VI Government and Martin have appealed to the Third Circuit, and that appeal is pending.

In the first case, *Berne Corp. v. Gov't of the V.I.*, 120 F. Supp. 2d 528 (D. V.I. 2000) [*Berne I*], the district court held that two real property owners in the Virgin Islands had a private right of action under 48 U.S.C. § 1401a. *See Berne I*, 120 F. Supp. 2d at 533-535 (Pet. App. 42-45). *See also* Pet. 11. Following its analysis of the federal taxation rights granted under 48 U.S.C. § 1401a, the district court denied a motion to dismiss and preliminarily enjoined

> the Government of the Virgin Islands and Roy Martin, tax assessor, . . . from collecting property

1. The Third Circuit also ruled that the district court did not abuse its discretion in holding that no issue of clean hands barred issuance of a preliminary injunction. *See Bluebeard's Castle, Inc. v. Gov't of the V.I.*, 321 F.3d 394, 397 n.4 (3rd Cir. 2003) (Pet. App. 3 n.4) [*Equivest II*].

> taxes against the real property owned by [plaintiffs] until the tax assessor can establish at a trial on the merits that the property taxes on those properties have been assessed on their actual value in accordance with 48 U.S.C. § 1401a and 33 V.I.C. § 2404.

Id. at 537 (Pet. App. 50). As the district court later found, the VI Government then apparently settled *Berne I* "by agreeing to bring the Tax Assessor's assessment procedures and processes into compliance with the uniform national appraisal standards, and to appoint an independent special master to review for compliance." *Berne Corp. v. Gov't of the V.I.*, __ F. Supp. 2d __, 2003 WL 21078073, at *2 (D.V.I. May 12, 2003) (consolidated case) (Pet. App. 55) [*Berne II*]. As the district court noted, however, the VI Government subsequently "chose to ignore the *Berne* Settlement and relitigate the same issues in [*Equivest* and] other cases." *Id.*

When the VI Government assessed taxes against Equivest in a manner inconsistent with the district court's ruling in *Berne I* and the settlement in connection with that case, Equivest brought an action and sought a preliminary injunction. *See Equivest St. Thomas, Inc. v. Gov't of the V.I.*, 208 F. Supp. 2d 545 (D. V.I. 2002) (Pet. App. 17-32) [*Equivest I*]. As had plaintiffs in *Berne I*, Equivest alleged that the VI Government and Martin were violating federal law by denying Equivest its statutory right to have its property assessed at its "actual value" in accordance with 48 U.S.C. § 1401a. *Id.* at 546 (Pet. App. 17).

With respect to the private right of action issue, the district court in *Equivest I* held that "[r]elying on my analysis

in *Berne [I]*, I also find that Equivest has a valid section 1983 action." *See Berne [I]*, 120 F. Supp. 2d at 533-34 (finding that section 1401a creates a federally protected right actionable under section 1983). *Id.* at 548 n.6 (Pet. App. 21-22 n.6).[2] The district court also specifically reiterated its holding that 33 V.I.C. § 2404 "did not supercede the federal law or remove the local property tax from federal control. The federal requirement under section 1401a that the tax assessor use 'actual value' in assessing the tax remains in force and is unaffected by its territorial implementation." *Id.* at 548 (Pet. App. 20) (quoting *Berne I*, 120 F. Supp. 2d at 532-33).[3] Following an evaluation of the four preliminary injunction factors, the district court granted Equivest's motion for preliminary injunction with respect to the properties that satisfied the factors. *Equivest I*, 208 F. Supp. 2d at 549 (Pet. App. 24).

In their interlocutory appeal, the VI Government and Martin only raised issues of whether the district court lacked federal subject matter jurisdiction in light of certain territorial legislation and whether the district court abused its discretion in rejecting their unclean hands argument. The court of appeals agreed with the district court that section 1401a remained binding and effective following enactment of a real

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2. In *Equivest I*, the district court frequently referred to *Berne I*, rather than repeating its analysis.

3. The district court observed in *Equivest I* that, contrary to the impression created by the *Berne* settlement, the VI Government had "changed its position. Rather than putting all its efforts into correcting the tax assessment process and negotiating settlements on unlawfully assessed properties, the [VI Government] now seems to want to litigate these matters." *Equivest I*, 208 F. Supp. 2d at 552-53 (Pet. App. 31).

property assessment law by the Virgin Islands legislature in 1955. *Equivest II*, 321 F.3d at 399 (Pet. App. 8-9). When the Virgin Islands legislature enacted specific tax requirements at that time, those specific provisions supplanted the interim provisions contained in section 1401b, as expressly provided in that section. However, the "expiratory language in § 1401b applies only to the specific requirements of that section; it does not apply to the rest of the statute, including the general requirements of § 1401a." *Id.* (Pet. App. 8). Concluding that Equivest had "adequately alleged a violation under 48 U.S.C. § 1401a," the court of appeals held that Equivest's claims "'arise under' § 1401a" and "are subject to the jurisdiction of the District Court under 48 U.S.C. § 1612 and 28 U.S.C. § 1331." *Id.* at 402 (Pet. App. 14).[4]

The VI Government and Martin did not argue in their appeal to the Third Circuit, and the opinion in *Equivest II* did not address, the issue of a private right of action under 48 U.S.C. § 1401a. *Equivest II*, 321 F.3d 394 (Pet. App. 1-16).[5] Nor did they raise the Revised Organic Act issue. *Id.*

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4. Petitioners have misread the decision of the Third Circuit in this case by confusing the distinct issues of (1) a private right of action and (2) federal subject matter jurisdiction. In their petition, they state that "the Third Circuit held that § 1401a creates a private right of action . . ." Pet. 3. However, in connection with their interlocutory appeal, petitioners only raised—and the court of appeals therefore only addressed—the issue of federal subject matter jurisdiction, not whether respondent had a private right of action. *Equivest II*, 321 F.3d at 399-402 (Pet. App. 9-15).

5. Even though the district court had addressed the issue of a private right of action under 48 U.S.C. § 1401a and even though *Gonzaga University v. Doe*, 536 U.S. 273 (2002),was decided (Cont'd)

In the meantime, the district court held a trial in the consolidated actions brought against the VI Government and Martin by the *Berne* plaintiffs, the *Equivest* plaintiffs and several other plaintiff landowners. *See Berne II*, 2003 WL 21078073 at *1 (Pet. App. 59-60). On May 23, 2003, the district court issued a detailed opinion (Pet. App. 52-125) and entered a permanent injunction, enjoining assessment of taxes against the plaintiffs, including Equivest, until "a reliable and credible system that will appraise real property consistently at its actual, market value in compliance with 48 U.S.C. § 1401a" is established. *Id.* at *25 (Pet. App. 113). The district court also entered a permanent injunction, pursuant to 5 V.I.C. § 80, requiring the VI Government and Martin to comply with terms of the *Berne* settlement that was previously entered. *Id.* (Pet. App. 113). The VI Government and Martin have appealed the district court's order granting the permanent injunction in *Berne II* to the Third Circuit.

After the district court's ruling in *Berne II* and the filing of the petition here, the Virgin Islands legislature passed a bill that allows for interim collection of real property taxes, pending further judicial proceedings. Act of July 14, 2003, No. 6586, 2003 V.I. Sess. Laws __ (Opp. App. 1a-11a). The governor signed the bill, with certain line-item vetoes. *Id.* (Opp. App. 9a-11a).

(Cont'd)
approximately one-and-a-half months before the VI Government and Martin filed their brief with the Third Circuit, the VI Government and Martin did not raise the issue of a private right of action before the Third Circuit until they filed a motion for rehearing *en banc*, which was denied without further briefing. Pet. App. 126-127.

REASONS FOR DENYING THE PETITION

The petition seeks review of a preliminary injunction that has now been supplanted by a broader permanent injunction and is on appeal. If this Court were to consider any issues arising from the related Virgin Islands tax cases, it should do so only after the court of appeals has addressed them in the context of the permanent injunction.

The court of appeals, in considering petitioners' interlocutory appeal here, correctly applied established principles regarding statutory interpretation and federal question jurisdiction in affirming the findings of the district court that: (1) the general federal tax requirements adopted by Congress in 48 U.S.C. § 1401a were not superceded by the enactment of certain specific requirements by the Virgin Islands legislature; (2) Equivest's claims "adequately alleged a violation under 48 U.S.C. § 1401a"; and (3) Equivest's claims "'arise under' § 1401a" and "are subject to the jurisdiction of the District Court under 48 U.S.C. § 1612 and 28 U.S.C. § 1331." *Equivest II*, 321 F.3d at 402 (Pet. App. 14). The decision below, which affirmed the interlocutory order, contains no ruling worthy of review.

In fact, petitioners have not challenged any of the actual holdings of the court of appeals in their petition. Instead, they raise in their question presented two new issues that could have been, but were not, developed before the court of appeals. The first issue was only raised in a motion for rehearing *en banc*, although no new decisions had been issued between the time petitioners filed their brief with the court of appeals and the time they filed their motion,[6] and the

6. The first issue presented by petitioners is whether respondent had a private right of action under 48 U.S.C. § 1401a, an issue that was answered affirmatively by the district court.

second issue has never been raised in any of the proceedings or submissions of the parties prior to the petition.[7] Because the two issues could have been, but were not, presented to the court of appeals in connection with its original decision and because petitioners do not challenge any of the holdings of the court of appeals, nothing in the petition warrants further review. Moreover, if either of the issues presented warranted review, it should occur in the context of the Third Circuit's ruling on the pending appeal of the permanent injunction directed to the same underlying conduct that is the subject of the superceded interlocutory ruling as to which petitioners seek review now.

ARGUMENT

I. There are No Special Circumstances in this Case Warranting Review of An Appeal of an Interlocutory Order.

In *Equivest I*, the district court granted respondent's request for a preliminary injunction, in part, and denied petitioners' motion to dismiss. *See Equivest I*, 208 F. Supp. 2d at 546 (Pet. App. 18). The district court, in its order, indicated that a trial on the merits would be set promptly. *Id.* at 551-52 (Pet. App. 29). Both aspects of the district court's order were interlocutory. *See* 28 U.S.C. § 1292(a)(1) (authorizing appeal of interlocutory orders granting injunctions); *Organization for a Better Austin v. Keefe*, 402 U.S. 415,420 (1971) (Harlan, J., dissenting) ("Review of preliminary injunctions is a classic form of interlocutory

7. The second issue presented by petitioners relates to whether a statute passed in 1954, as amended, repealed 48 U.S.C. § 1401a by implication.

appeal . . ."); *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987) (noting that district court denied a motion to dismiss and certified its decision for interlocutory appeal); *Braden v. University of Pittsburgh*, 552 F.2d 948, 965 (3rd Cir. 1977) (Garth, J., concurring.) ("[T]his case is before us on interlocutory appeal from an order of the district court which did no more than to deny [appellant's] motion to dismiss [appellee's] complaint under Fed. R. Civ. Proc. 12 (b)(6)."). The court of appeals affirmed the district court's interlocutory order. *See Equivest II*, 321 F.3d at 402-03 (Pet. App. 15-16). Absent compelling circumstances, this Court does issue a writ of certiorari when it is presented with an appeal from an interlocutory order. *See Brotherhood of Locomotive Firemen v. Bangor & Aroostock R. Co.*, 389 U.S. 327, 328 (1967) (denying the petition "because the Court of Appeals remanded the case [and thus it] is not yet ripe for review by this Court"). *See also American Construction Co. v. Jacksonville, T. & K.W. Railway Co.*, 148 U.S. 372, 384 (1893) ("this court should not issue a writ of certiorari to review a decree of the circuit court of appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause").

Consideration of an interlocutory appeal would be particularly premature in this case because the district court has already conducted a trial and issued a permanent injunction. *See Berne II*, 2003 WL 21078073 at *29-31 (Pet. App. 121-125).[8] Additionally, petitioners have already appealed the final judgment in *Berne II*, which granted a

8. *Berne II* is a consolidated action involving the *Equivest* plaintiffs, the *Berne* plaintiffs, and other plaintiffs. *See Berne II*, 2003 WL 21078073 at *1 (Pet. App. 52).

permanent injunction to Equivest and other landowners, to the Third Circuit.[9] In *Berne I*, the district court performed a full analysis of the private right of action issue. *Berne I*, 120 F. Supp. 2d at 534-35 (Pet. App. 42-45). If petitioners have properly preserved the arguments, and if they choose to do so, they will have the opportunity to raise in the court of appeals in *Berne III* the issues presented in their petition, where they may, for the first time, be properly briefed by the parties and considered by the court of appeals. Therefore, the petition should be denied in light of its interlocutory nature and the fact that a superceding permanent injunction is currently on appeal to the Third Circuit.

Legislation passed by the Virgin Islands subsequent to the filing of the petition further eliminates any need for review by this Court. On July 1, 2003, the Virgin Islands legislature passed Bill No. 25-0039, to allow petitioners to collect taxes for tax years 1999 through 2004 based upon the real property assessments utilized in 1998, with the ability to seek adjustments for those years in the event a new and compliant tax system results in higher assessments. *See* Act of July 14, 2003, No. 6586, 2003 V.I. Sess. Laws __ (Opp. App. 1a-11a). On July 14, 2003, the governor signed the bill, with certain line-item vetoes not relevant to the interim collection of real property taxes. *Id.* (Opp. App. 9a-11a).

Petitioners contend that the district court's ruling has created a "financial crisis" and, at least implicitly, suggest that this Court should review the case to address the "crisis." Pet. 3-4. The passage of recent legislation, however, permits collection of taxes pending further judicial proceedings, thus

9. The appeal to the Third Circuit of *Berne II*, *Berne Corp., et al. v. Gov't of the V.I., et al.*, No. 03-2549 (3rd Cir., docketed, May 28, 2003), will be designated as *Berne III* in this Opposition.

resolving any alleged financial crisis arising from the granting of a permanent injunction.[10]

II. The Court Should Not Grant the Petition, Vacate and Remand ("GVR") or Grant the Petition to Hear this Case Because the Question Presented Was Not Raised Below and Petitioners Have Not Properly Preserved The Issues.

Petitioners' question presented claims to seek a GVR based upon either *Gonzaga University v. Doe*, 536 U.S. 273 (2002) or the Revised Organic Act of 1954.[11] However, neither of these arguments was made in petitioners' brief on the merits in the court of appeals, or addressed in its opinion. Nor is either of these arguments founded on decisions or other

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10. The district court's preliminary injunction applied only to Equivest's two properties, the absence of tax revenue from which could hardly precipitate a financial crisis. *Equivest I*, 208 F. Supp.2d 545 (Pet. App. 17-32). The district court's permanent injunction, which is not before this Court, has broader application.

11. Strictly speaking, while petitioners claim to be seeking a GVR, they are not. Instead, petitioners are seeking a summary disposition on the merits on two issues that were not briefed before the court of appeals. *See* Pet. 14 (Petitioners ask this Court to "grant certiorari, vacate the judgment below, and remand this case ('GVR') to the Third Circuit with instructions to dismiss the case for lack of subject matter jurisdiction."). If petitioners were actually seeking a GVR, they would instead request that this Court remand to the court of appeals for further consideration in light of *Gonzaga*. Perhaps petitioners have adopted this unorthodox approach in light of their failure to raise the issues asserted in this petition before the court of appeals and knowing that *Gonzaga* was decided before they submitted their brief to the court of appeals.

intervening factors subsequent to the decision of the court of appeals. *See Equivest II*, 321 F.3d 394 (Pet. App. 1-16).

The district court opinion in this case held that there was a private right of action under 42 U.S.C. § 1983 arising from a violation of the right to an assessment at the "actual value" contained in 48 U.S.C. § 1401a. *See Equivest I*, 208 F. Supp. 2d at 548, n.6 (Pet. App. 21-22 n.6). The district court relied upon its detailed analysis of the private right of action issue in *Berne I*, which is consistent with the holding and principles contained in *Gonzaga*. *See Berne I*, 120 F. Supp. 2d at 534-35 (Pet. App. 42-45).[12]

In their appeal to the Third Circuit, petitioners did not raise either the *Gonzaga* private right of action issue or the argument that 48 U.S.C. § 1401a was impliedly repealed by the Revised Organic Act of 1954, as amended, 48 U.S.C. §§ 1541-1645 (the "ROA"), even though *Gonzaga* was decided well before the petitioners submitted their brief to the Third Circuit[13] and the ROA was enacted in 1954.

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12. *See* Section III.A., *infra*, for an evaluation of *Berne I*'s consistency with *Gonzaga*.

13. As noted, petitioners raised the private right of action issue in their motion for rehearing *en banc*. *See* n.5, *supra*. However, petitioners were aware of this issue when they filed their appeal because the requirement of a private right of action was addressed by the district court and because it is a long-standing concept. *See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 377 (1982) ("In 1975 the Court unanimously decided to modify its approach to the question whether a federal statute includes a private right of action.").

Therefore, it cannot be said that an intervening event or decision would support a GVR in this case because petitioners had ample notice of *Gonzaga* and the ROA, but either failed to—or decided not to—raise those issues below. Given that petitioners did not appeal on these issues and that they were not briefed in connection with the court of appeals' decision, this Court should abide by its practice "to decide cases on the grounds raised and considered in the Court of Appeals . . ." and decline to issue a GVR or to grant the petition. *Owasso Independent School District v. Falvo*, 534 U.S. 426, 431 (2002) (quoting *Bragdon v. Abbott*, 524 U.S. 624, 638 (1998)); *Youakim v. Miller*, 425 U.S. 231, 234 (1976) ("ordinarily, this Court does not decide questions not raised or involved in the lower court").

Petitioners attempt to address their failure to raise in the courts below the questions presented in their petition by claiming that the issues raised relate to federal subject matter jurisdiction, which can be raised at any time. However, this Court has determined that the existence of a private right of action is a separate legal concept from federal subject matter jurisdiction. *See National Railroad Passenger Corp. v. National Ass'n of Railroad Passengers*, 414 U.S. 453, 456 (1974). *See also Erienet, Inc. v. Velocity Net, Inc.*, 156 F.3d 513, 520 (3rd Cir. 1998) ("The Supreme Court has recognized that the question of whether a statute creates a private right of action is distinct from the question of whether a federal court has jurisdiction.") (citing *National Railroad Passenger Corp.*, 414 U.S. at 456). While a court would ordinarily address the question of a private right of action first, *see National Railroad Passenger Corp.*, 414 U.S. at 456, the issue may be waived because it is distinct from federal subject matter jurisdiction. *See Hopp v. The City of Pittsburgh*, 194 F.3d 434, 440 (3rd Cir. 1999) (holding that

appellant waived its challenge based upon lack of a private right of action under 42 U.S.C. § 1981 by failing to timely assert the argument). Because the issue of a "private right of action" is not jurisdictional, and may be waived, the Fourth Circuit recently ruled—on remand for reconsideration in light of *Gonzaga*—that appellants' failure properly to raise the issue in the court of appeals resulted in a waiver of the potential argument. *See National Home Equity Mortgage Association v. Face*, 322 F.3d 802 (4th Cir. 2003). Similarly, if the Court were to issue a GVR in this case, the Third Circuit would be presented with the unappealed holding of the district court that 48 U.S.C. § 1401a creates a private right of action for landowners in the Virgin Islands and that respondent prevailed on that right of action. As was the case in *National Home*, it would be appropriate in these circumstances for the Third Circuit to affirm its previous decision based upon a waiver of the "private right of action" issue and defer any consideration of the issue to the pending appeal of the order entering a permanent injunction, if the argument is properly presented there.

III. There Is No Need to Grant the Petition or GVR Based Upon An Asserted Lack of a Private Right of Action or the Revised Organic Act of 1954 Because Consideration of Those Issues Will Not Alter the Result in this Case

A. The Asserted Lack of a Private Right of Action

Prior to filing this petition, petitioners sought rehearing by the court of appeals, asserting that its opinion conflicted with *Gonzaga's* holding regarding private rights of action. *See* Pet. 2. The court of appeals denied rehearing, both by the deciding panel and *en banc*. *See* Pet. App. 126-27.

Thus, while respondent did not have the opportunity to respond to petitioners' argument regarding the impact, if any, of *Gonzaga* on this case, the court of appeals has already denied rehearing when presented with these arguments.

In addition to the reasons stated above, there is no merits-based justification for granting the petition here because the decision of the court of appeals was correct and the district court's analysis of the private right of action issue was consistent with *Gonzaga*.[14] The district court in *Berne I* affirmatively determined that a violation of 48 U.S.C. § 1401a's requirement that land be taxed at its "actual value" results in a "deprivation of . . . rights, privileges, or immunities secured by the Constitution and laws." *Berne I*, 120 F. Supp. 2d at 533-35 (Pet. App. 42-45) (quoting 42 U.S.C. § 1983). The district court in *Berne I* held that "48 U.S.C. § 1401a creates a federally protected *right* actionable pursuant to 42 U.S.C. § 1983." *Id.* at 535 (Pet. App. 44-45) (emphasis added). Section 1401a "was intended to benefit taxpayers by creating uniformity of taxation and reducing the burdens of taxation on land (and thus landowners such as plaintiffs) in productive use." *Id.* (Pet. App. 44). As petitioners acknowledge, the district court "based [its] analysis on [this] Court's decisions in *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103 (1989), and *Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498

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14. Even if the court of appeals' decision was in error (which it was not), review would not be justified on that basis because this Court is not a court of error correction. *See* Robert L. Stern et al., *Supreme Court Practice* 321 (8th ed. 2002) (quoting Address of Chief Justice Vinson before the American Bar Association, Sept. 7, 1949) ("[T]he Supreme Court 'is not and never has been, primarily concerned with the correction of errors in lower court decisions.' ") (citation omitted).

(1990)." (Pet. 11-12 n.5). *Gonzaga*, which cites *Golden State* with approval, would not dictate a different result.[15]

Additionally, this is not, as was *Gonzaga*, a Spending Clause case. Here, the right of landowners to be taxed upon the actual value of their property was explicitly created by Congress in 48 U.S.C. § 1401a under its broad power to govern territories under the United States Constitution. *See* U.S. Const. art. IV, § 3, cl. 2. ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . ."). In contrast, *Gonzaga* expressly dealt with attempts by a person to create an action based upon a purported interest arising in connection with

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15. Moreover, the petition attempts to treat this case as an implied right of action case, rather than a section 1983 case, asserting that:

> Even assuming, *arguendo*, that § 1401a creates a private right of action for Virgin Islands landowners . . . , "a plaintiff suing under an implied right of action still must show that the statute manifest an intent 'to create not just a private *right* but also a private *remedy*.'" *Gonzaga Univ.*, 536 U.S. at 284 (emphasis in original).

Pet. 21. The district court specifically held, however, that respondent's claim was actionable under 42 U.S.C. § 1983. *See Equivest I*, 208 F. Supp. 2d at 548 n.6 (Pet. App. 21-22) (citing *Berne I*, 120 F. Supp.2d at 533-34 (Pet. App. 40-42)) (holding "that Equivest has valid section 1983 action"). In this Section 1983 case, *Gonzaga* specifically requires that the statute need only confer a right, not a remedy, because the remedy is implied from section 1983. *See Gonzaga*, 536 U.S. at 284 ("Plaintiffs suing under § 1983 do not have the burden of showing an intent to create a private remedy because § 1983 generally supplies a remedy for the vindication of rights secured by federal statutes.").

"spending legislation."[16] If *Gonzaga* is to be analyzed in the context of Congress' explicit power to legislate over the territories, it should be in a setting where the private right of action issue has been fully briefed and carefully considered by the court of appeals. Therefore, if the private right of action issue is ever to be worthy of consideration by this Court in the context of 48 U.S.C. § 1401a, it should not occur in the context of this appeal of an interlocutory ruling.

B. The Revised Organic Act of 1954 ("ROA")

Petitioners raise the argument that the ROA may have silently repealed 48 U.S.C. § 1401a for the first time in their petition. As they acknowledge, the ROA only superceded the laws applicable to the Virgin Islands that addressed the same issues. Pet. 23. Petitioners then note that the ROA superceded the bulk of the Organic Act of 1936. *Id.* The 1954 Revised Organic Act, however, did not purport to, and did not, supercede other laws, including Section 1401a, notwithstanding petitioners' unfounded assertions to the contrary. Section 1401a remains effective. *See Equivest II*, 321 F.3d at 399 (Pet. App. 8-9). It is for the U.S. Congress to determine whether that law should be repealed. Again, if the Court is ever to consider this issue, it should be in the context of a case where the issue has been briefed and considered in the courts below.

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16. *See Gonzaga*, 536 U.S. at 279 ("But we have never before held, and decline to do so here, that *spending legislation* drafted in terms resembling those of FERPA can confer enforceable rights.") (emphasis added); *Id.* at 281 ("Our more recent decisions, however, have rejected attempts to infer enforceable rights from *Spending Clause statutes*.") (emphasis added); *Id.* at 290 ("FERPA's nondisclosure provisions . . . serve primarily to direct the Secretary of Education's *distribution of public funds to educational institutions*.") (emphasis added).

CONCLUSION

The court of appeals' decision applies sound principles of law to the issues presented on appeal from an interlocutory order. Petitioners do not challenge any of the actual holdings of the court of appeals. There is no justification for this Court to consider two new issues that could have been, but were not, raised before the court of appeals. The petition for a writ of certiorari should accordingly be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

ACT NO. 6586

BILL NO. 25-0039

TWENTY-FIFTH LEGISLATURE OF THE VIRGIN ISLANDS

OF THE UNITED STATES

Regular Session

2003

To amend title 33, Virgin Islands Code, sections 2402, 2452, 2453 and add section 2456, relating to the assessment and collection of real property taxes, to provide for other related purposes, and to repeal Act 6574

---0---

BE IT ENACTED by the Legislature of the Virgin Islands:

SECTION 1. The Legislature finds and declares that:

~~(a) It is a federal mandate of Congress and the policy of the Legislature of the Virgin Islands to equalize and more equitably distribute taxes on real property in the Virgin Islands and to reduce the burden of taxation now imposed on land in productive use in the Territory;~~

~~(b) Congress, through the Revised Organic Act of the Virgin Islands, 48 U.S.C. §1401a, commands the Territory to establish and implement a real property tax system based on the actual value of the real property;~~

~~(c) The District Court of the Virgin Islands has ruled that the statutory framework for taxing real property and the administration of the taxing system by the Virgin Islands Tax Assessor and the Board of Tax Review violate federal and Virgin Islands law;~~

~~(d) The District Court in *Berne Corp. et. al. v. the Government of the Virgin Islands*, et. al. Civil Nos. 2000-141, 2000-167, 2001-151, 2001-155, 2001-181, 2001-196, 2001-197, 2001-228, and 2002-057 ("the Property Tax Litigation") has decreed that the Government shall make no further effort to collect any tax bills already issued for any real property for tax years 1999, 2000, and 2001, nor may the Government issue any tax bills for the tax year 2002 and beyond, unless provisions are made for adjustment of tax bills until such time as the tax system is revised to reliably assess all classes of real property at actual value;~~

(e) The Virgin Islands is experiencing a severe fiscal crisis that threatens the financial stability of the Government and its institutions;

(f) A protracted injunction against collecting real property taxes would have Draconian consequences for the Government and the people of the Virgin Islands;

(g) To defray the costs of complying with the Decree in the Property Tax Litigation and the cost of revising the property tax system of the Virgin Islands ~~to comply with 48 U.S.C. §1401a~~, it is crucial that Government collect property tax revenues expeditiously; and

(h) To fulfill its fiduciary duty to the people of the Virgin Islands to promote and ensure the public health, safety and general welfare by ensuring the collection of sufficient revenues to provide for adequate government services and to develop a fair and equitable property tax system, the measures set forth in this Act must be executed faithfully.

SECTION 2. ~~The Government and the Tax Assessor shall bring the Virgin Islands real property tax system into compliance with the federal mandate of 48 U.S.C. §1401a that real property be assessed based on its actual value, and into accordance with the Uniform Standards of Professional Appraisal Practice or other appropriate nationally recognized standards.~~

SECTION 3. Notwithstanding title 33, Virgin Islands Code, section 2402, the Tax Assessor may issue tax bills and collect taxes at the 1998 assessment level, for all classes of real property, including commercial and non commercial real property, for the tax years 1999, 2000, 2001, 2002, 2003 and 2004, before the revision of the property tax ~~system required by section 2 of this Act~~ and by the Property Tax Litigation, provided the tax due shall be subject to adjustment for each year according to the assessed value based on ~~actual value when~~ the new system ~~is~~ implemented. The taxpayer shall be entitled to a credit applied to his subsequent years' tax bills

or a refund for any over-payment that may have accrued as the result of the payment of any of his tax bills for any year from 1999 until the new system is implemented. In the case of an underpayment of the taxes paid pursuant to this section, the taxpayer may be billed for any prior years' real property tax obligations and shall have 120 days in which to pay the sum due, without penalty or interest otherwise due under title 33, Virgin Islands Code, chapter 89, section 2494.

SECTION 4. Title 33, section 2452, Virgin Islands Code, is amended by striking "sixty (60)" and by inserting in lieu thereof the "one hundred twenty (120)".

SECTION 5. Title 33, Virgin Islands Code, section 2453 is amended by re-designating subsection (c) as subsection (d) and inserting a new subsection (c) to read as follows:

"(c) The Board of Tax Review shall designate a hearing officer, qualified by training or experience in the areas of law, tax, or accounting, to conduct hearings under this chapter, to compile evidence and establish findings of fact, but the final substantive decision in all appeals or complaints under this chapter shall be made by the Board of Tax Review."

SECTION 6. Title 33, chapter 87, Virgin Islands Code, is amended by adding a section 2456 to read as follows:

"§2456. Office of the Tax Assessor Revolving Fund

(a) There is established in the Treasury of the Government of the Virgin Islands a separate and distinct fund designated as "The Office of the Tax Assessor's Revolving

Fund." The Commissioner of Finance shall provide for the administration of the Fund, and no monies shall be available for expenditure from the Fund except as provided by this section.

(b) The Fund shall consist of one percent of the real property taxes collected annually by the Commissioner of Finance or an amount not to exceed $500,000 per annum, and such sums as may be appropriated from time to time by the Legislature, all of which shall remain available until expended.

(c) Monies shall be disbursed from the Fund by the Commissioner of Finance upon the authorization of the Lieutenant Governor, for the purpose of purchasing and maintaining data processing equipment, for staffing and training of personnel, and for the purchase and procurement of such other necessary supplies, equipment and professional services as may be determined to be necessary by the Lieutenant Governor for maintaining and improving the Office of the Tax Assessor.

(d) The Commissioner of Finance shall maintain a record of all monies deposited into and disbursed from the Fund and shall annually report to the Governor and the Legislature on the status of the Fund.

(e) Unless extended by the Legislature, the authorization for this Fund shall expire on October 1, 2008."

SECTION 7. The sum of $1,600,000 is appropriated in the fiscal year ending September 30, 2003, from the property taxes collected pursuant to section 3 of this Act to The Actual Value Property Tax Assessment Fund, established by the Commissioner of Finance pursuant to paragraph 4 of the Decree entered on May 12, 2003, in the Property Tax Litigation. The sum shall remain available until expended.

SECTION 8. Notwithstanding title 33, Virgin Islands Code, section 2402 (a) or any other law to the contrary, the next assessment of commercial and non-commercial property shall occur in the year 2005, and biennially thereafter.

SECTION 9. (a) The Tax Study Commission established under section 3 (c) of Act No. 6391, shall analyze and make recommendations for the adjustment of the 1.25 percent millage rate ~~established in 48 U.S.C. § 1401b~~ and shall submit a report and its recommendations to the Governor and to the Legislature within 180 days after the effective date of this Act.

(b) The Law Revision Commission established under title 1, Virgin Islands Code, section 275, in conjunction with The Tax Study Commission and the Tax Assessor's Office, shall recommend needed changes to the property tax code to bring property tax laws into ~~compliance with the requirements of 48 U.S.C. § 1401a and in~~ harmony with modern times and conditions, and shall submit to the Governor and to the Legislature within 270 days after the effective date of this Act, a report on their findings and recommendations, including proposed draft legislation.

SECTION 10. Pursuant to title 3, Virgin Islands Code, section 180, subsection (h), the Governor shall submit to the Legislature within 30 days after the effective date of this Act, the names of nominees selected to fill any vacancies on the Board Tax Review.

SECTION 11. Act No. 6574 (Bill No. 25-0003) is repealed.

SECTION 12. Severability. Each section and each provision of this Act stand alone, and if any provision in this Act has been held, or in the future is held, to be unconstitutional, preempted by federal law, or otherwise invalid by any court of competent jurisdiction, all of the other provisions set forth in this Act are intended to, and shall remain, fully effective and shall be interpreted to exclude the unconstitutional, preempted, or otherwise invalid provision. If any section, subsection, paragraph, sentence, clause, word, or portion of this Act is for any reason held to be unconstitutional, preempted by federal law, or otherwise invalid, that holding shall not effect the remaining portions of this Act. The Legislature expressly declares that it would have enacted this Act and each section, subsection, paragraph, sentence, clause, word, or portion thereof despite the fact that one or more sections, subsections, paragraphs, sentences, clauses, words, or portions of this Act may be held unconstitutional, preempted by federal law, or otherwise invalid.

Thus passed by the Legislature of the Virgin Islands on June 18, 2003.

Appendix

Witness our Hands and the Seal of the Legislature of the Virgin Islands this 1st Day of July, A.D., 2003.

s/ David S. Jones
David S. Jones
President

s/ Shawn-Michael Malone
Shawn-Michael Malone
Legislative Secretary

Appendix

THE UNITED STATES VIRGIN ISLANDS
OFFICE OF THE GOVERNOR
GOVERNMENT HOUSE
Charlotte, Amalie, V.I. 00802
340-774-0001

THE GOVERNOR'S OBJECTIONS

Bill No. 25-0039 is hereby approved with the exception of the following items, part or parts, portion or portions thereof, which are nereby objected to (and deleted and disapproved in full) pursuant to Section 9(d) of the Revised Organic Act of 1954, as amended:

SECTION 1.

(a) It is a federal mandate of Congress and the policy of the Legislature of the Virgin Islands to equalize and more equitably distribute taxes on real property in the Virgin Islands and to reduce the burden of taxation now imposed on land in productive use in the Territory;

(b) Congress, through the Revised Organic Act of the Virgin Islands, 48 U.S.C. §1401a, commands the Territory to establish and implement a real property tax system based on the actual value of the real property;

(c) The District Court of the Virgin Islands has ruled that the statutory framework for taxing real property and the administration of the taxing system by the Virgin Islands Tax Assessor and the Board of Tax Review violate federal and Virgin Islands law;

(d) The District Court in *Berne Corp. et. al. v. the Government of the Virgin Islands, et. al.* Civil Nos 2000-141, 2000-167, 2001-151, 2001-155, 2001-181, 2001-196, 2001-197, 2001-228, and 2002-057, ("the Property Tax Litigation") has decreed that the Government shall make no further effort to collect any tax bills already issued for any real property for tax years 1999, 2000, and 2001, nor may the Government issue any tax bills for the tax year 2002 and beyond, unless provisions are made for adjustment of tax bills until such time as the tax system is revised to reliably assess all classes of real property at actual value;

* * *

(g)

* * *

to comply with 48 U.S.C. §1401a

* * *

SECTION 2. The Governor and the Tax Assessor shall bring the Virgin Islands real property tax system into compliance with the federal mandate of 48 U.S.C. §1401a that real property be assessed based on its actual value, and into accordance with the Uniform Standards of Professional Appraisal Practice or other appropriate nationally recognized standards.

Appendix

SECTION 3.

system required by section 2 of this Act . . . actual value when is

SECTION 9.

(a) established in 48 U.S.C. §1401(b)

(b) compliance with the requirements of 48 U.S.C. §1401a and in

Witness my hand and the Seal of the Government of the United States Virgin Islands at Charlotte Amalie, St. Thomas, Virgin Islands, this 14th day of July, A.D., 2003.

s/ Charles W. Turnbull
Charles W. Turnbull
Governor

(3)

FILED

AUG 20 2003

OFFICE OF THE CLERK

No. 02-1819

In The
Supreme Court of the United States

GOVERNMENT OF THE VIRGIN ISLANDS, *et al.*,

Petitioners,

v.

BLUEBEARD'S CASTLE, INC., *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

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INTRODUCTION

In their Brief in Opposition, Respondents[1] devote little effort to refuting the merits of Petitioners' arguments that 48 U.S.C. § 1401a: (1) does not unambiguously confer a private right of action under the standard set forth in *Gonzaga University v. Doe*, 536 U.S. 273 (2002); and, in any event (2) has been implicitly repealed by the Revised Organic Act of 1954, as amended. Instead, Respondents primarily assert that the questions presented in the Petition are not worthy of Supreme Court attention – even in the context of a grant, vacate and remand ("GVR") order – because these questions purportedly were not addressed by the Third Circuit in its underlying decision. Respondents admit, however, that "a court would ordinarily address the question of a private right of action first[.]" Opp. 13. And they do not dispute the absence of federal subject matter jurisdiction if, as alleged, Congress implicitly repealed § 1401a. The Third Circuit thus could, and should, have resolved *sua sponte* these threshold issues before affirming a preliminary injunction entered by the District Court of the Virgin Islands ("District Court") that precluded the Government of the Virgin Islands ("Government") from collecting real property taxes.

Respondents further claim that Supreme Court review is unwarranted because the underlying decision is interlocutory. Respondents do not dispute, however, that in

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[1] Respondents captioned their brief as "*Government of the Virgin Islands, et al. v. Equivest St. Thomas, Inc.*" This case, however, was docketed in this Court and in the Third Circuit as "*Government of the Virgin Islands, et al. v. Bluebeard's Castle, Inc., et al.*" Equivest St. Thomas, Inc. is a corporation formed by the merger of the two Respondents.

appropriate circumstances "certiorari review of interlocutory orders of federal courts is available." *Ohio Citizens For Responsible Energy, Inc. v. Nuclear Regulatory Comm'n*, 479 U.S. 1312, 1313 (1986). Such review is necessary here because the decisions below are inconsistent with this Court's decision in *Gonzaga University* and, moreover, flout the stated will of Congress to confer on the Government substantial autonomy over local issues, such as real property taxation. In spite of this Congressional mandate – and based solely on an arcane 1936 statute, confers no private right of action, and has been implicitly repealed – the District Court has placed onerous restrictions on the Government's ability to assess real property and collect property taxes in the midst of a fiscal crisis. *See, e.g.*, *Mazurek v. Armstrong*, 520 U.S. 968, 975 (1997) (reviewing preliminary injunction because "the Court of Appeals' decision is clearly erroneous under our precedents" and "the lower court's judgment has produced immediate consequences for" the State of Montana).[2]

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[2] Respondents note that the Virgin Islands Legislature passed legislation "subsequent to the filing of the petition" that purportedly "permits the collection of taxes pending further judicial proceedings, thus resolving any alleged financial crisis arising from the granting of a permanent injunction." Opp. 10-11; Opp. App. 1a-11a. This legislation, however, is subject to the permanent injunction entered by the District Court. By order dated August 13, 2003, the District Court partially lifted the May 12, 2003, permanent injunction. Supp. App. 1-3. It remains unclear whether this order permits the Government to collect tens of millions of dollars of delinquent taxes. It is, however, clear that the tax assessor continues to be prohibited from independently assessing real property taxes in the Virgin Islands pursuant to statutory duties assigned him by the Virgin Islands Legislature.

REASONS FOR GRANTING THE PETITION

A. A GVR Is Warranted In Light Of *Gonzaga University*.

According to Respondents, the Petition should be denied because Petitioners purportedly did not raise, and the Third Circuit purportedly did not address, the private right of action issue. Respondents chiefly rely on *National Railroad Passenger Corporation v. National Association of Railroad Passengers*, 414 U.S. 453 (1974), for the proposition that the private right of action issue must be preserved for appeal unlike the issue of subject matter jurisdiction. Opp. 13-14. In *National Railroad Passenger Corporation*, however, this Court found that the question of whether a "provision of law creates a cause of action whereby a private party . . . can enforce duties and obligations imposed by the [statute]" raises a "threshold question" that "overlap[s]" the jurisdiction inquiry because "it is only if such a right of action exists that we need consider whether the respondent had standing to bring the action and whether the District Court had jurisdiction to entertain it."[3] The requested GVR is appropriate here

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[3] *See also Consolidated Edison Co. of N.Y. v. O'Leary*, 117 F.3d 538, 543 (2d Cir. 1997) ("Although the district court dismissed the present complaints for lack of standing, and it was that issue that was briefed by the parties before this court, we first must consider whether the action is maintainable, that is, whether plaintiffs have stated a valid cause of action, 'for it is only if such a right of action exists that we need consider whether the respondent had standing to bring the action.' "); *Cedar-Riverside Assocs., Inc. v. City of Minneapolis*, 606 F.2d 254, 259 n.10 (8th Cir. 1979) (holding that, under *National Railroad Passenger Corporation*, court must first examine whether the statute invoked creates a private right of action); *Keaukaha-Panaewa Community Ass'n v. Hawaiian Homes Comm'n*, 588 F.2d 1216, 1220 (9th Cir. 1978)

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because, as Respondents concede, the Third Circuit did not decide this "threshold question" before finding that the District Court had jurisdiction to enjoin the Government from collecting real property taxes. Opp. 11.

This Court found a GVR order appropriate under similar circumstances in *Face v. National Home Equity Mortgage Association*, ___ U.S. ___, 123 S. Ct. 69 (2002), *reh'g denied*, 154 L. Ed. 2d 557, 123 S. Ct. 651 (2002), which was remanded to the Fourth Circuit "for further consideration in light of *Gonzaga University*[.]" In *Face*, the appellants had not raised, nor had the court considered, the implied right of action issue before this Court issued its GVR order. *See Nat'l Home Equity Mortg. Ass'n v. Face*, 322 F.3d 802, 804 (4th Cir. 2003), *petition for cert. filed*, 71 U.S.L.W. 3791 (U.S. June 9, 2003) (No. 02-1810).[4] In fact, the petitioners in *Face* did not even directly raise the private right of action issue in their underlying

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(same); *M.B. Guran. Co. v. City of Akron*, 546 F.2d 201, 203 (6th Cir. 1976) (same); *Raypath, Inc. v. City of Anchorage*, 544 F.2d 1019, 1021 (9th Cir. 1976) ("Issues of standing and the existence of a private right of action often overlap. As a threshold matter, we may examine the question whether a private cause of action exists in favor of a particular plaintiff. If it does not, the standing issue need not be considered.").

[4] On remand, the Fourth Circuit decided not to address *Gonzaga University* because the appellants never appealed the district court's finding that the Alternative Mortgage Transaction Parity Act of 1982 ("Parity Act"), 12 U.S.C. §§ 3801-06 conferred a private right of action. *See Face*, 322 F.3d at 804. The Fourth Circuit's approach, which Petitioners submit is flawed, has no bearing on this Court's holding that a GVR was appropriate under the circumstances of that case. Moreover, the appellants in *Face* have filed a petition for writ of *certiorari* to address the Fourth Circuit's holding. *See Face v. Nat'l Home Equity Mortg. Ass'n*, Petition for Writ of *Certiorari*, 71 U.S.L.W. 3791 (U.S. June 9, 2003) (No. 02-1810).

petition for writ of *certiorari*.[5] This Court's decision to issue a GVR order in *Face* is thus consistent with the obligation of federal courts to address – *sua sponte* if necessary[6] – the private right of action issue as a "threshold" inquiry.[7]

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[5] *See generally* Petition for Writ of *Certiorari*, *Face v. Nat'l Home Equity Mortg. Ass'n*, ___ U.S. ___, 123 S. Ct. 69 (2002) (No. 01-1827) (available at 2002 WL 32135838).

[6] *See Ross v. Hotel Employees & Restaurant Employees Int'l Union*, 266 F.3d 236, 242 (3d Cir. 2001) (addressing the private-right-of-action issue for the first time on appeal even though the plaintiff did not submit any arguments on the issue on summary judgment before the district court); *TCG Detroit v. City of Dearborn*, 206 F.3d 618, 622 (6th Cir. 2000) (holding that although the private-right-of-action issue was not raised on appeal, it was "incumbent" on the court to address it); *Mobil Corp. v. Marathon Oil Co.*, 669 F.2d 366, 370 (6th Cir. 1981) (addressing the private-right-of-action issue *sua sponte*); *Curran v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 622 F.2d 216, 230 (6th Cir. 1980) (same).

[7] As in *Face*, this Court may issue a GVR order here without first resolving the unsettled question of whether the private right of action inquiry implicates statutory or Constitutional subject matter jurisdiction. *Compare Burks v. Lasker*, 441 U.S. 471, 476 n.5 (1979) ("The question whether a cause of action exists is not a question of jurisdiction") *with Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 190 (1994) ("Question of the existence of a statutory cause of action is, of course, one of statutory construction") (citation omitted) *and Nat'l R.R. Passenger Corp.*, 414 U.S. at 456 (explaining that the private right of action question "overlap[s]" with the question of "whether a federal district court has jurisdiction under the terms of the [federal statute] to entertain such a suit") *and Siegel Transfer, Inc. v. Carrier Express, Inc.*, 54 F.3d 1125, 1139 (3d Cir. 1995) (affirming dismissal of "federal transportation law claims for lack of subject matter jurisdiction because neither the Interstate Commerce Act nor the Elkins Act grants the plaintiffs the right to pursue their allegations in a federal court") *and TCG Detroit*, 206 F.3d at 622 (holding that whether a statute confers an implied right of action is jurisdictional "since the question of [] standing implicates the United

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Respondents argue, in the alternative, that the District Court's analysis of the private right of action issue is consistent with *Gonzaga University*, Opp. 14-15, but they have failed to demonstrate how § 1401a creates a private right of action enforceable under 42 U.S.C. § 1983 "in clear and unambiguous terms," *Gonzaga Univ.*, 536 U.S. at 290. In fact, Respondents merely parrot the District Court's opinion, which found that § 1401a confers a private right of action because that statute purportedly "was intended to benefit taxpayers by creating uniformity of taxation and reducing the burdens of taxation on land (and thus landowners such as plaintiffs) in productive use." Opp. 15 (quoting Pet. App. 44).[5] The District Court's analysis was rendered without the benefit of this Court's decision in *Gonzaga University*, which "resolv[ed] any ambiguity in [its] own opinions." *Gonzaga Univ.*, 536 U.S. at 282 (rejecting the notion that a plaintiff can enforce a statute under 42 U.S.C. § 1983 "so long as Congress intended that the statute 'benefit' putative plaintiffs"). The legislative history relied on by the District Court thus falls far "short of an unambiguously conferred right to support a cause of action brought under § 1983." *Id.* at 283.

States Constitution's Article III case-or-controversy requirement, which must be satisfied for a federal court to hear the case") *and Brooks v. Blue Cross & Blue Shield of Fla., Inc.*, 116 F.3d 1364, 1378 (11th Cir. 1997) (holding that under prudential limitations on standing, "[t]he "zone of interests' test compels us to examine the 'nature and source' of the plaintiff's allegations and inquire whether the Congress, in passing the MSP laws, intended to confer the right to sue upon individuals in the position of the Employer Plaintiffs").

[5] As discussed in the Petition, Congress enacted § 1401a with the principal purpose of providing the Virgin Islands with more tax revenue. *See* Pet. 5-6, 20-21.

Finally, Respondents assert that *Gonzaga University*'s holding must be limited to interpretations of "spending legislation." Opp. 16-17. The Supreme Court, however, did not so limit its holding but, instead, broadly declared that "if Congress wishes to create new rights enforceable under § 1983, it must do so in clear and unambiguous terms – no less and no more than what is required for Congress to create new rights enforceable under an implied right of action." 536 U.S. at 290. Nor do Respondents even attempt to reconcile their limited interpretation of *Gonzaga University* with the Court's decision to issue a GVR order in *Face*, which involved an interpretation of the Parity Act promulgated under the Commerce Clause. *See Nat'l Home Equity Mortg. Ass'n v. Face*, 64 F. Supp. 2d 584, 592 (E.D. Va. 1999) ("In enacting the Parity Act, Congress exercised its plenary Commerce Clause powers."), *aff'd*, 239 F.3d 633 (4th Cir. 2001), *cert. denied*, 534 U.S. 823 (2001). As in *Face*, this Court should issue a GVR order requiring the Third Circuit to consider the "threshold" private right of action issue in light of *Gonzaga University*.

B. A GVR Is Warranted In Light Of Congress' Implicit Repeal Of § 1401a.

Respondents do not, because they cannot, dispute that the District Court lacked subject matter jurisdiction to enjoin Petitioners if, as alleged, the Revised Organic Act of 1954 repealed § 1401a. *See Bruner v. United States*, 343 U.S. 112, 116 (1952) ("'It is clear, that when the jurisdiction of a cause depends upon a statute the repeal of the statute *takes away the jurisdiction*.'") (quoting *Merchants' Ins. Co. v. Ritchie*, 5 Wall. 541, 544-45 (1867)) (emphasis added). Nor do Respondents argue that this issue can be

waived. *See United States v. Griffin*, 303 U.S. 226, 229 (1938) (holding that lack of jurisdiction of a federal court touching the subject matter of the litigation cannot be waived by the parties). Instead, Respondents summarily claim that "[i]t is for the U.S. Congress to determine whether that law should be repealed." Opp. 17. This conclusory statement is unpersuasive.[9]

Respondents ignore 48 U.S.C. § 1574(c), in which Congress *did determine* to abrogate all "laws of the United States applicable to the Virgin Islands on July 22, 1954" that are inconsistent with the Revised Organic Act of 1954 and its amendments. *See* Pet. 23-26. Similarly, Respondents ignore the seminal Third Circuit case on this issue, *Virgo Corporation v. Paiewonsky*, 384 F.2d 569 (3d Cir. 1967). *Virgo Corporation* held that, in light of Congress' intent in the Revised Organic Act of 1954 to provide "a greater degree of autonomy to the people of the territory," there is no reason to believe that Congress "intended to shackle the legislature with restrictions which had been placed in 1936 upon the municipal councils as the direct successors of the old Danish colonial councils." *Id.* at 577. Here, as in *Virgo Corporation*, there is no reason to believe that Congress, after it enacted a charter of comprehensive local self-government in 1954, intended to "shackle" the Virgin Islands Legislature with restrictions originally imposed in 1936 to cure perceived defects in the remnants of a Danish colonial system. At a minimum, therefore, this Court should GVR the case to reconsider the District

[9] Notwithstanding Respondents' assertion to the contrary, *see* Opp. 12, this question was raised as the second issue presented in the Petition for Rehearing *En Banc* filed with the Third Circuit.

Court's subject matter jurisdiction under § 1401a in light of these arguments.

CONCLUSION

For the above reasons, Petitioners, the Government of the United States Virgin Islands and Roy Martin, in his official capacity as Tax Assessor, respectfully urge this Court to grant the petition for a writ of certiorari, vacate the decision of the United States Court of Appeals for the Third Circuit, and remand with instructions to dismiss the case.

Respectfully submitted,

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FOR PUBLICATION

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS DIVISION OF ST. THOMAS AND ST. JOHN

	)	Civ. No. 2000-141
	)	Civ. No. 2000-167
In re: Tax Litigation	)	Civ. No. 2001-151
	)	Civ. No. 2001-155
	)	Civ. No. 2001-181
	)	Civ. No. 2001-196
	)	Civ. No. 2001-197
	)	Civ. No. 2001-228
	)	Civ. No. 2002-057

ORDER

The Government of the Virgin Islands has renewed its motion to stay the portion of this Court's May 12, 2003 Decree that enjoined the Government from collecting property taxes based on the unlawful assessment system presently in place. In the May 12, 2003 Decree, I suggested that the Government would be able to issue bills based on the illegal assessment values for calendar year 1998 reflected in the 1999 tax bills[1] if it provided a mechanism to adjust the assessment and bills retroactively. I indicated that this could be done by giving

[1] Although property in the Virgin Islands is assessed on a calender year basis, the assessment roll on which tax bills are issued is established as of January 15 of the following year, when the Tax Assessor determines the ownership of all properties. *See* 33 V.I.C. §§ 2301(a), 2405(a). Accordingly, the 1999 property tax bill was based on the 1998 assessment level.

credits for overpayment and issuing supplemental bills for underpayments once the Special Master has certified that the Territory's Tax assessment system as equitably and reliably assessing real property at its actual value and all property has been reassessed from calender year 1998 forward. The Virgin Islands responded to this suggestion with the passage of Act No. 6586, which provides the aforementioned relief. The Governor signed this Act into law on July 14, 2003. Therefore, as I find that the Government has acted sufficiently to provide relief for the Territory's taxpayers and believe that the Government is entitled to collect revenue from property taxes, I shall modify the May 12, 2003 injunction in regard to all non-plaintiff taxpayers to allow the Government to issue tax bills based on the 1998 assessments reflected in the 1999 tax bills. The injunction shall remain unmodified and in full effect for all parties to this litigation.

Accordingly, it is hereby

ORDERED that the portion of the May 12, 2003 injunction prohibiting the Government from collecting property taxes based on the 1998 assessment reflected in the 1999 tax bills is **LIFTED** in regard to all non-plaintiff taxpayers only, and that it remains in full effect regarding all plaintiffs in this litigation.

ENTERED this 13th day of August, 2003.

For the Court

/s/ Thomas K. Moore
Thomas K. Moore
District Judge

ATTEST:
WILFREDO MORALES
Clerk of the Court

By: Frank Blackman
Deputy Clerk

cc: Hon. R.L. Finch [8/13/03 /s/ FB]
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